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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

JOINT COUNCIL OF TEAMSTERS NO. 42, AND ITS AFFILIATED LOCAL UNIONS, SALES DRIVERS & DAIRY EMPLOYEES, LOCAL 166; GENERAL TRUCK DRIVERS, LOCAL 235; GENERAL TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL 692; CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 186; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 420; GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL 982; TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 898; TEAMSTERS & WAREHOUSEMEN, LOCAL 381, ALL AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 87, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

(Parties to Petition and Names of Attorneys listed on inside cover)

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.; BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC.; ENGINEERING CONTRACTORS ASSOCIATION, INC.; SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION,

Respondents.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC., ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Intervenors.

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Intervenor.

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Questions Presented for Review.

(1) WHETHER OWNER-OPERATORS ARE EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE LABOR MANAGEMENT RELATIONS ACT ("LMRA").

(2) WHETHER THE NATIONAL LABOR RELATIONS BOARD ERRED BY EXCLUDING THE WORK OF OWNER-OPERATORS FROM THE PROTECTION OF THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) OF THE LMRA.

Parties to the Proceeding.

The following are parties to this proceeding:

(1) Joint Council of Teamsters No. 42, and its affiliated local unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs, & Helpers, Local 692; Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982; Truck Drivers, Warehousemen and Helpers, Local 898; Teamsters & Warehousemen, Local 381, all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(2) The National Labor Relations Board.

(3) The Associated General Contractors of California, Inc., the Building Industry Association of California, the Engineering Contractors Association and the Southern California Contractors Association.

(4) The Associated Independent Owner-Operators, Inc., the California Dump Truck Owners Association, and the Associated General Contractors of California Dump Truck Owners Association.

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America ("Unions") pray that *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW.

The order of the Ninth Circuit Court of Appeals entered on March 18, 1983 is not reported.[1] The order was pursuant to remand of this Court. This Court's order granting petition for writ of *certiorari*, vacating judgment and remanding to the Ninth Circuit Court of Appeals is reported at 459 U.S. . . ., 103 S. Ct. 1172 (1983).[2]

The original opinion of the Ninth Circuit Court of Appeals as amended on denial of rehearing and rehearing *en banc* remains officially reported at 671 F.2d 305 (9th Cir. 1982).[3]

The decision and order of the National Labor Relations Board which has now been enforced *in toto* is officially reported at 248 N.L.R.B. 808 (1980).[4]

JURISDICTION.

On December 21, 1981 the Ninth Circuit Court of Appeals issued a decision granting enforcement in part of a decision and order of the National Labor Relations Board ("Board") and remanding the case to the Board for consideration of remedy.

On January 4, 1982 the Unions filed a petition for rehearing and suggestion for rehearing *en banc*.

On March 2, 1982 the Ninth Circuit filed an order denying the petition for rehearing and suggestion for rehearing *en banc* but amending its earlier decision.

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[1]The text of the order is set forth in full in Appendix i.

[2]The text of this Court's order is set forth in full in Appendix ii.

[3]The opinion as it was originally reported is set forth in full in Appendix iii.

[4]The decision and order is set forth in full in Appendix iv.

On May 14, 1982 the Unions applied to this Court for an order extending the time in which to petition for *certiorari*. On May 18, 1982, the Honorable William H. Rehnquist, Associate Justice of this Court, granted an extension to July 1, 1982.

On July 1, 1982 the Unions filed their petition for *certiorari* raising three questions for review.

On February 22, 1983 this Court entered its order granting the petition, vacating the judgment of the Ninth Circuit Court of Appeals and remanding for further consideration in light of *Shepard v. National Labor Relations Board*, 459 U.S. ..., 103 S. Ct. 665 (1983).

On March 18, 1983 the Ninth Circuit Court of Appeals entered its order on remand. In its order, the Court of Appeals reinstated its earlier opinion insofar as it pertains to two of the questions originally posed for review and resolved the third question by conforming its opinion to this Court's holding in *Shepard*. In so doing, the Court of Appeals enforced *in toto* the Board's original order. This Petition seeks review of the two questions originally posed which remain unresolved.

The date of entry of judgment is March 18, 1983.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED.[5]

Section 2(3), 29 U.S.C. § 152(3) (1976), of the LMRA provides in pertinent part:

> The term 'employee' shall . . . not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home,

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[5]The full text of each pertinent statutory provision appears in Appendix v.

> or any individual employed by his parent or spouse, *or any individual having the status of an independent contractor*, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined [emphasis added].

Section 8(e), 29 U.S.C. § 158(e) (1976), makes it an unfair labor practice for a union and an employer to enter into an agreement that requires self-employed persons to join the union in order to work for the employer:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract . . . whereby such employer . . . agrees to cease . . . doing business with any other person. . . .

The section is limited by the following:

> *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction.

It is a separate unfair labor practice pursuant to Section 8(b)(4)(ii)(A), 29 U.S.C. § 158(b)(4)(ii)(A) (1976), for a union to exert coercion in an effort to force or require an employer to enter into an agreement which is prohibited by Section 8(e):

> It shall be an unfair labor practice for a labor organization . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is — (A) forcing or requiring any employer or self-employed person . . . to enter into any agreement which is prohibited by subsection (e) of this section . . . .

STATEMENT OF THE CASE.

A. Preliminary Statement.

This case most recently came to the Ninth Circuit on remand from this Court. Previously, the case had been before the Ninth Circuit on cross-petitions for enforcement and review of a decision and order of the Board.

At all times, the Ninth Circuit's jurisdiction has been based upon 29 U.S.C. § 160(e) and (f) (1976).

B. Statement of Facts.

1. The Master Labor Agreement.

The Unions and the Associated General Contractors of California, Inc. ("AGC"), the Building Industry Association of California ("BIA"), the Engineering Contractors Association ("ECA") and the Southern California Contractors Association ("SCCA") entered into a collective bargaining agreement known as the Southern California Master Labor Agreement ("MLA") on or about July 1, 1977. The MLA was entered into by the Unions on behalf of covered employees and by the AGC, BIA, ECA and SCCA on behalf of their employer-members in the construction industry in Southern California, excluding San Diego County.

The MLA required all employer-members to carry owner-operators[6] on their payroll as employees and to apply all terms and conditions of the MLA, including the union security provisions, to owner-operators.

Certain terms and conditions of the MLA, when applied to owner-operators, were found by the Board to be violative

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[6]An owner-operator is defined by the MLA as "an individual that holds legal or registered title to a motor vehicle or to the power equipment unit thereof in his name and who personally drives such vehicle or unit in the performance of work covered by this Agreement." Article XII, Section 1300. See Appendix vi, *infra*.

of Section 8(e) of the LMRA and not protected by the construction industry proviso to Section 8(e).[7] The Board found the relevant provisions to be secondary because owner-operators had been declared by the Ninth Circuit to be independent contractors in an earlier case and it found the scope of the provisions to be overbroad because they were not limited to work performed solely at the geographical site of construction.

2. The Owner-Operators.

Owner-operators perform loading, hauling and unloading of construction materials for employer-members using dump-truck equipment. The equipment varies, but often includes a tractor, semitrailer, truck and transfer trailer, a tractor with a bottom dump trailer, semibottom dump trailer or a truck and pup trailer. Some of the equipment used by owner-operators is leased.

Employer-members utilize owner-operators for all types of construction projects. However, their basic function is the same: loading, hauling and unloading of materials on and between jobsites. In some instances all their work is performed at the geographical site of construction; at other times it includes travel away from jobsites for dumping and hauling materials from "borrow pits" to jobsites.

In some instances, employer-members supplement their regular hauling needs by using owner-operators together with other drivers utilizing company-owned trucks to work on the same construction project at the same time as owner-operators. In those instances, owner-operators work side-by-side with the other drivers, observing the same starting and quitting times and breaks and following the same some-

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[7]Relevant provisions of the MLA are set forth in full in Appendix vi.

what detailed instructions given by the employer-members' supervisory personnel who oversee the performance of all drivers working on the jobsite. If they fail to observe the instructions, they are subject to the same disciplinary action as other drivers.

In most cases, owner-operators have not contracted directly with employer-members. Instead, they are brought to jobsites of employer-members by brokers who contract directly with employer-members and have subhaul arrangements with owner-operators.

The California Public Utilities Commission tariff establishes minimum hourly rates normally received by owner-operators. However, there are instances where they have received a higher hourly rate.

3. Related Decisions.

Owner-operators were historically covered by successive MLA's without serious dispute over their employment status for many years before this controversy arose.

Then, in 1965, Associated Independent Owner-Operators ("AIOO"), a voluntary association representing a minority of owner-operators, first filed unfair labor practice charges with the Board alleging violations of Section 8(b)(4)(ii)(A) of the LMRA against the Unions. In pertinent part, AIOO alleged that the Unions had engaged in unlawful secondary conduct to compel owner-operators to become union members by coercing employer-members to cease doing business with owner-operators who were not union members. The basis for the allegation was AIOO's contention that owner-operators were independent contractors and were not employees within the meaning of Section 2(3) of the Act.

The Board had not previously considered the employment status of owner-operators[8] although, in an earlier case, it had ruled that other owner-operators (not doing hauling work) were employees rather than independent contractors.[9]

Thus, in 1970 the Board first examined the employment status of the same owner-operators involved in this case. It concluded that they were not independent contractors but were employees.[10]

AIOO obtained review of the Board's decision in the District of Columbia Circuit Court of Appeals. The D.C. Circuit reviewed the evidence and legal standard applied by the Board and affirmed the Board's holding that owner-operators were employees.[11]

Review of the D.C. Circuit holding was not sought in this Court. Instead, in 1971 some owner-operators supported petitions to decertify the Unions as their bargaining representative with the Board. In their petitions, those owner-operators asserted, contrary to the Board and the D.C. Circuit, that they were independent contractors. Alternatively, they argued that in the event the Board again found them to be employees, a substantial number of them no longer wished to be represented by the Unions.

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[8]Under California law the question has been settled for fifty years. In California courts, the owner-operators are employees. *Chapman v. Edwards*, 133 Cal. App. 72, 24 P.2d 211, 214 (1933).

[9]*Operating Engineers, Local 12 (Associated Independent Owner-Operators, Inc.)*, 168 N.L.R.B. 863 (1967).

[10]*General Teamsters, Local 982 (J.K. Barker Trucking Co.)*, 181 N.L.R.B. 515 (1970).

Note, that the Board's decision was made with due regard for the Ninth Circuit's decision on review of the *Operating Engineers* case (*supra* n. 7), reversing that case. *See* n. 5 in 181 N.L.R.B. 515 (1970), citing *Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d 1383 (9th Cir. 1969).

[11]*Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322 (D.C. Cir. 1971).

Again, the Board independently reconsidered the status of the same owner-operators and again concluded that they were employees.[12] A direction of election was subsequently issued on March 5, 1974.[13]

The existing MLA was due to expire on June 30, 1974. Consequently, the Unions and the AGC, BIA, ECA and SCCA entered into negotiations and, on July 1, 1974, executed a new MLA.

Because the new MLA covered owner-operators and because the elections previously directed by the Board had not yet been held, AIOO filed new unfair labor practice charges against the AGC, BIA, ECA and SCCA alleging unlawful assistance to the Unions pursuant to Section 8(a)(1) and (2) of the LMRA. 29 U.S.C. § 158(a)(1) and (2) (1976). The charges blocked further processing of the election.

The Board found that unfair labor practices had been committed[14] and cross-petitions for enforcement and review were filed in the Ninth Circuit. The Ninth Circuit thereupon abruptly substituted its judgment for the studied, twice-considered judgment of the Board and the D.C. Circuit and transformed the same owner-operators previously found to be employees into independent contractors.[15] Ironically, the Ninth Circuit referred to the Board and D.C. Circuit as having been "blinded" in their earlier appraisals.[16]

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[12]*Contractor Members of the Associated General Contractors of California, Inc.*, 201 N.L.R.B. 311 (1973).

[13]*Contractor Members of the Associated General Contractors of California, Inc.*, 209 N.L.R.B. 363 (1974).

[14]*Associated General Contractors of California, Inc. (Teamsters, Local 94)*, 220 N.L.R.B. 540 (1975). *But cf. RCA Del Caribe, Inc.*, 262 N.L.R.B. No. 116 (1982) (similar conduct would probably not now constitute an unfair labor practice).

[15]*Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271 (9th Cir. 1977).

[16]*See AGC v. NLRB, supra* 564 F.2d at 282 n. 11.

The Ninth Circuit remanded the unfair labor practice case to the Board and the Board consolidated it with the election cases which had been held in abeyance. The Board then issued a terse supplemental decision and order in which it automatically accepted the Ninth Circuit's view as the "law of the case" (even though not the Board's law) and dismissed all outstanding proceedings.[17]

The Unions had no opportunity to seek review of the Ninth Circuit's decision because they were technically prevailing parties.[18]

4. The Present Controversy.

This abrupt turn of events triggered the filing of the instant unfair labor practice charges alleging that certain provisions of the MLA executed on July 1, 1977 violated Section 8(e).

C. Proceedings and Disposition Below.

The Unions argued before the Board that owner-operators were employees and, alternatively. that the pertinent provisions of the MLA were within the scope of the construction industry proviso to Section 8(e). The Board refused to review the status of owner-operators and found the provisions overboard.

Upon review, the Ninth Circuit affirmed the Board's refusal to reconsider the employment status of owner-operators and affirmed the Board's conclusion that the proviso was inapplicable. Contrary to the Board, however, the Ninth Circuit concluded that a make-whole remedy was appro-

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[17] *Associated General Contractors of California, Inc.*, 239 N.L.R.B. 686 (1978).

[18] The Unions had opposed the election petitions and had intervened in the unfair labor practice proceedings on the side of the Respondent employers seeking dismissal of the petitions because of the lack of a question concerning representation and seeking dismissal of the unfair labor practice charges.

priate and remanded the case to the Board.

The Unions, for the first time in a position to seek review, then filed their petition for *certiorari* seeking review of the employment status of owner-operators, the scope of the construction industry proviso to Section 8(e) and the propriety of a make-whole remedy. While their petition was pending, this Court issued its decision in *Shepard v. National Labor Relations Board*, 459 U.S. . . ., 103 S. Ct. 665 (1983) holding that the Board's decision not to seek a make-whole remedy absent evidence of actual coercion should not be disturbed.

Shortly thereafter, this Court granted the Unions' petition, vacated the Ninth Circuit's judgment and remanded the case for reconsideration in light of *Shepard*.

Most recently, on March 18, 1983, the Ninth Circuit reinstated its opinion on the employment status of owner-operators and the scope of the construction industry proviso to Section 8(e), amended its opinion, in conformity with *Shepard*, to deny a make-whole remedy, and enforced the Board's original order *in toto*.

The Unions now seek review of the Ninth Circuit's decision and judgment on the employment status of owner-operators and the scope of the construction industry proviso to Section 8(e).

ARGUMENT.

This writ should be allowed for the following reasons:

I.

There Now Exists an Express Conflict Among the Circuits as to Whether Owner-Operators Are Employees Within the Meaning of Section 2(3) of the LMRA.

After more than a decade of controversy, the Unions, employer-members and owner-operators have no final resolution of their dispute.

Twice the Board independently considered the employment status of owner-operators. After developing a full evidentiary record in each case and after carefully applying its precedents in each case, it found them to be employees within the meaning of the LMRA.

Upon review of the Board's interpretation, the applicable canon of statutory construction requires that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S. Ct. 1794, 1802 (1969). That canon has particular applicability to cases where the Board construes the scope of Section 2(3). *See NLRB v. Hendricks County Rural Electric Membership Corp.*, 102 S. Ct. 216, 222 (1981); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 94 S. Ct. 1757, 1762 (1974). Such matters of interpretation flow from the Board's broad authority, under Section 9(b) of the LMRA, 29 U.S.C. § 159(b) (1976), to determine the scope of appropriate collective bargaining units. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491, 67 S. Ct. 789, 793 (1947).

Thus, where the Board has previously determined that certain persons are employees rather than independent contractors, "[s]uch a determination should not be set aside

just because a court would, as an original matter, decide the case the other way." *NLRB v. United Insurance Co.*, 390 U.S. 254, 260, 88 S. Ct. 988, 991 (1968).

Here, the Board compounded the Ninth Circuit's first error in *Associated, supra*, 564 F.2d at 282 (substituting its judgment for the Board's) by automatically yielding to the Ninth Circuit without further investigation and in complete disregard of its statutory responsibility. In doing so, the Board denied to the Unions procedural due process just as it did to United Insurance Company prior to this Court's review. *See United Insurance Co. v. NLRB*, 272 F.2d 446, 449 (7th Cir. 1959) (previous Board decision in representation matter adverse to employer "could not serve as a substitute for evidence" in subsequent unfair labor practice matter where employer had no opportunity to seek review of adverse decision).

Moreover, the Ninth Circuit's present decision is simply an echo of its first error and firmly reinstates an express conflict with the D.C. Circuit's holding on precisely the same subject in *Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322 (D.C. Cir. 1971).[19]

Because of this "unusually direct conflict between two circuits," the Unions respectfully request that *certiorari* issue. *Corning Glass Works v. Brennan*, 417 U.S. 188, 191, 94 S. Ct. 2223, 2226 (1974).

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[19]The D.C. Circuit has continued to adhere to its decision where applicable. *See Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 899 n. 29 (D.C. Cir. 1978). *But cf. Building Material and Dump Truck Drivers, Local 36 v. NLRB*, 673 F.2d 550 (D.C. Cir. 1982), (construing language of the San Diego MLA not applicable to this case), *aff'd., sub nom. Shepard v. NLRB*, 459 U.S. ..., 103 S. Ct. 665 (1983).

II.

This Case Raises an Important Question Concerning the Scope of the Construction Industry Proviso Which Has Not Been Settled by This Court.

Based upon its original finding that owner-operators were independent contractors, the Ninth Circuit affirmed the Board's finding that provisions of the MLA requiring union membership were secondary when applied to owner-operators.

The Unions agreed that if owner-operators were independent contractors, the provisions were secondary but argued that the provisions were protected by the proviso to Section 8(e) which excepts "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . ."

The Board found the proviso inapplicable because some owner-operators do not do all their work *at* the geographical site of construction: "The primary purpose of the construction industry proviso — to avoid tensions among groups of employees at the same site — has little relevance to persons having such incidental contact with the site . . . [w]e find that such work is not . . . within the meaning of the . . . proviso."[20]

The Ninth Circuit simplified the Board's holding: "On these facts, the Board found that the owner-operators are delivery persons, not construction site workers, and there-

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[20]*See infra*, Appendix ii.

fore their work is not covered by the on-site proviso"[21] and affirmed.

Last term, this Court observed that "the proviso is only partly concerned with jobsite friction." *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. . . ., 102 S. Ct. 2071, 2081 (1982). More important than physical proximity is the clear Congressional intent to shield from Section 8(e) agreements not to subcontract construction work to nonunion contractors. *Id.* at 2079. Simultaneous physical presence on the jobsite (*e.g.*, "cheek-by-jowl" proximity) need not be given conclusive weight. *See Donald Shriver Inc. v. NLRB*, 635 F.2d 859, 883-84 (D.C. Cir. 1980) ("the entire thrust of the proviso . . . is that craft work on a construction site cannot be treated as isolated and removed from other craft work"). Thus, because work performed by owner-operators *originates* at the jobsite and is *controlled* from the jobsite, the applicability of the proviso should not depend upon the quantity of physical presence but upon the quality of the relationship between owner-operators and other crafts working on the same construction job. Such an appraisal will not "ignore the realities of employment situations on a construction jobsite", *Id.* at 883, as does the Ninth Circuit's here.

The reality here, which has been ignored to date, is that uncontrolled use of owner-operators has created a serious

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[21] *See infra*, Appendix i. Note that the Ninth Circuit's characterization of owner-operators as "delivery persons" is plainly wrong and contrary to the Board's decision. The Board did not conclude that owner-operators were "delivery persons." Rather, the Board analogized its prior holdings regarding delivery persons to owner-operators and concluded that the *same result* was warranted. "Delivery persons" in those cases analogized by the Board, are distinctly unlike owner-operators whose work assignments *originate* at the site of construction and who are under the continuous, routine *control* of jobsite contractors. These factors critically distinguish owner-operators from "delivery persons."

threat to long established employment standards in the construction industry and has allowed work historically assumed to be construction work to be done by union workers alongside non-union workers on the same construction jobs at the same time. The Unions assert that these are the very evils intended by the proviso to be prevented.

An important question of federal labor law is presented which is deserving of this Court's consideration.

III.
Conclusion.

For the foregoing reasons, the Unions respectfully request that *certiorari* issue to review the decision below.

Respectfully submitted,

GEORGE A. PAPPY,
RALPH M. PHILLIPS,
PAPPY, KAPLON, VOGEL & PHILLIPS,
By RALPH M. PHILLIPS,
Attorneys for Petitioners Joint Council of Teamsters No. 42, and its affiliated local unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs & Helpers Local 692; Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982; Truck Drivers, Warehousemen and Helpers, Local 898; Teamsters & Warehousemen, Local 381, all affiliated with the International Brotherhood of Teamsters.

Chauffeurs, Warehousemen and Helpers of America; Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

APPENDIX i.

Order.

United States Court of Appeals
for the Ninth Circuit.

Joint Council of Teamsters, No. 42, et al., Petitioners,

v.

National Labor Relations Board, Respondent, Associated Independent Owner-Operators, Inc., Intervenor.

National Labor Relations Board, Petitioner,

v.

Building Material and Dump Truck Drivers, Local 420, et al., Respondents. Associated Independent Owner-Operators, Inc., Associated General Contractors of California, Inc., California Dump Truck Owners Association, Intervenors.

California Dump Truck Owners Association, Petitioner,

v.

National Labor Relations Board, Respondent, Associated Independent Owner-Operators, Inc., Intervenor.

Nos. 80-7455, 80-7456, and 80-7457.

FILED: March 18, 1983.

Before: ELY and NORRIS, Circuit Judges, and COPPLE,* District Judge.

The opinion in the above-named case, which appears at 671 F.2d 305 (9th Cir. 1981), is ordered amended as follows:

Delete the entire portion of the opinion following the first paragraph of part II. In its place, substitute:

> In cases involving a violation of § 8(e), however, it is within the Board's discretion to deny reimbursement

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*The Honorable William P. Copple, United States District Judge for the District of Arizona, sitting by designation.

when there is no finding of actual coercion. *Shepard v. NLRB*, 51 U.S.L.W. 4087 (Jan. 18, 1983).

The order of the Board is ENFORCED.

West Publishing Company is requested to delete all references to the opinion appearing at 671 F.2d 305 and to reprint the opinion as amended in its entirety.

APPENDIX ii.

Supreme Court of the United States,
Office of the Clerk,
Washington, D.C. 20543

February 22, 1983

Mr. Ralph M. Phillips
Pappy, Kaplon, et al.
1545 Wilshire Blvd., Suite 211
Los Angeles, Calif. 90015

Re: Joint Council of Teamsters No. 42, et al., v. National Labor Relations Board, et al. No. 82-3

Dear Mr. Phillips:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in Light of Shepard v. National Labor Relations Board, 459 U.S. . . . (1983).

Very truly yours,
Alexander L. Stevas, Clerk

APPENDIX iii.

Opinion.

Joint Council of Teamsters, No. 42, et al., Petitioners,

v.

National Labor Relations Board, Respondent, Associated Independent Owner-Operators, Inc., Intervenor,
National Labor Relations Board, Petitioner,

v.

Building Material and Dump Truck Drivers, Local 420, et al., Respondents. Associated Independent Owner-Operators, Inc., Associated General Contractors of California Dump Truck Owners Association, Intervenors.

California Dump Truck Owners Association, Petitioner,

v.

National Labor Relations Board, Respondent. Associated Independent Owner-Operators, Inc., Intervenor.
Nos. 80-7455, 80-7456 and 80-7457.

Argued and Submitted Aug. 7, 1981. Decided Dec. 21. 1981.

As Amended on Denial of Rehearing and Rehearing En Banc March 2, 1982.

Before ELY and NORRIS, Circuit Judges, and COPPLE,* District Judge.

NORRIS, Circuit Judge:

We are called upon in this case to review an order of the NLRB declaring a provision in a collective bargaining agreement to be an unfair labor practice under § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976).

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*The Honorable William P. Copple, United States District Judge for the District of Arizona, sitting by designation.

The Board invalidated article XIII of the Master Labor Agreement between unions and contractor-employers in the Southern California construction industry because it prohibited general contractors from hiring non-union dump-truck owner-operators. The unions petition to deny enforcement of the Board's order, and the Board seeks a judgment of enforcement.[1] The owner-operators seek an order directing the Board to grant a make-whole remedy requiring the unions to reimburse them for initiation fees and dues paid to the unions, and for income lost by those truck owners who were denied work. We enforce the Board's order, but remand with directions to the Board to fashion a make-whole remedy or show cause why a make-whole remedy is inappropriate.

I.

Section 8(e) prohibits agreements between unions and employers that require a self-employed person to join the union in order to work for the employer[2] A construction industry proviso to § 8(e) carves out an exception for "work to be done at the site of the construction." Our inquiry is

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[1]The general contractors intervene in support of the Board's position; they are represented by the Associated General Contractors of California, Inc., the Building Industry Association of California, the Engineering Contractors Association, and the Southern California Contractors Association. The unions include the Joint Council of Teamsters No. 42, et al. The truck owners are represented by the California Dump Truck Owners Association and the Associated Independent Owner-Operators, Inc. The proceedings below are reported at *Joint Council of Teamsters No. 42, et al.*, 248 N.L.R.B., 808 (1980).

[2]Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976), provides that: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract . . . whereby such employer . . . agrees to . . . cease doing business with any other person . . . *Provided*, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction."

whether the Board erred in ruling that the operation of the owner-operated dump trucks in question is not on-site work within the meaning of the § 8(e) proviso.[3]

The facts are not in dispute. The dump truck operators haul materials from construction sites to remote dump sites, from "borrow" pits to construction sites, and from one construction site to another construction site. The truck owners spend most of their time on public roads away from the construction site. The only time spent at the construction site is during loading and unloading, when the dump truck operator ordinarily remains in his vehicle. *See Joint Council of Teamsters No. 42, et al.*, 248 N.L.R.B. 808, 816-17 (1980).

On these facts, the Board found that the owner-operators are delivery persons, not construction site workers, and therefore their work is not covered by the on-site proviso. That finding is consistent with Board findings in similar cases involving delivery of goods to a construction site. *See Drivers Local 695 v. NLRB*, 361 F.2d 547, 552 n.19 (D.C. Cir. 1966). In doubtful situations, we give weight to the Board's application of the Act, *NLRB v. Denver Building and Construction Trade Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951); where, as here, the situation is not doubtful, we readily enforce the Board's order.

None of the unions' arguments against the Board's order is persuasive. First, they cite this circuit's recent interpretation of the on-site proviso in *Pacific Northwest Chapter*

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[3]As a preliminary matter, the unions argue that the dump-truck owner-operators are not self-employed independent contractors, as the Board held, but employees of the general contractor. This argument is foreclosed, however, by *Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271 (9th Cir. 1977), in which this court held that these same dump-truck owners are independent contractors.

of the Associated Builders and Contractors, Inc. v. N.L.R.B., 654 F.2d 1301 (9th Cir.) (en banc), *cert. granted*, ___ U.S. ___, 102 S.Ct. 90, 69 L.Ed.2d ___ (1981). That case is not on point. The only issue decided in *Pacific Northwest* was whether the § 8(e) proviso "renders lawful clauses in collective bargaining contracts forbidding the employers to subcontract work *at any construction site* to a firm not having a contract with the signatory union." 654 F.2d at 1304 (emphasis added). In *Pacific Northwest*, where it was undisputed that the workers were engaged in on-site work, the court recognized that "the construction industry proviso narrowed the geographical scope of the [rule allowing secondary tactics] by introducing the jobsite limitation." 654 F.2d at 1313.

Second, the unions compare the on-site proviso in § 8(e) to an on-site proviso in the Davis Bacon Act (concerning minimum wages for construction workers on government contracts), arguing that the Federal Wage Appeals Board has held that it includes transportation between a construction site and a remote dump site. *See T. L. James & Co.*, Wage Appeals Board Case No. 69-2 (Aug. 13, 1969). We question the unions' reading of *T. L. James*. The Wage Appeals Board only held that a remote dump site or borrow pit is a part of the construction site. Slip op. at 6. The Board did not explicitly address the issue of transportation between the main site and the remote site. Moreover, we reject the unions' comparison of the two Acts. Neither the legislative history nor the text of the statute suggests that Congress intended § 8(e) to parallel the Davis Bacon Act.

Third, the unions rely on a Ninth Circuit affirmance of an arbitration award where, in the process of interpreting a provision in a collective bargaining agreement, the arbitrator determined that transportation between a construction site and a supply site was on-site work within the meaning of

§ 8(e). *See La Mirada Trucking, Inc. v. Teamsters Local Union 166,* 538 F.2d 286, 288 (9th Cir. 1976), *cert. denied,* 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 778 (1977). That decision has little bearing on the case before us. In *La Mirada,* the court did not interpret the on-site proviso to § 8(e); the court merely held reasonable the arbitrator's interpretation of a provision in a collective bargaining agreement, which the parties had stipulated to be identical to the on-site proviso of § 8(e). 538 F.2d at 289. Thus, the *La Mirada* court did not hold as a matter of law that transportation between a supply site and a construction site fits within the construction industry proviso.

II.

The truck owners claim that the Board's cease and desist order is an inadequate remedy. They contend that the Board should also order reimbursement of initiation fees and dues that the truck owners had paid to the union plus compensation for income lost to those truck owners who were denied work.

Although § 10(c) of the Act[4] vests broad discretion in the Board to fashion remedies that effectuate the policies of the Act, *see Fibreboard Paper Products Corporation v. N.L.R.B.,* 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964), that discretion is not unlimited. *See Acco Construction Equipment, Inc. v. N.L.R.B.,* 511 F.2d 848, 852 (9th Cir. 1975). In cases where money has been collected illegally, the Board should order a refund, absent some rational ground for not doing so. *Id.* We hold that the Board has failed to offer a rational ground for refusing to order reimbursement in this case.

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[4]Section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), provides that "the Board shall . . . take such affirmative action . . . as will effectuate the policies of this subchapter."

A.

The Board's principal reason for denying reimbursement is that the unions neither directly coerced the dump truck owner-operators to pay union fees nor illegally coerced the general contractors to accept article XIII in the collective bargaining agreement.[5] Either form of coercion would have constituted a violation of § 8(b)(4) of the Act.[6] Although the Board ruled that article XIII violated § 8(e) of the Act, it reasoned that reimbursement is inappropriate in the absence of a § 8(b)(4) violation.

We reject the Board's reasoning that the purposes of the Act are effectuated by reimbursement for violations of § 8(b)(4), but not for violations of § 8(e).[7] To be sure,

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[5]The Board offered the following explanation for its denial: "We hereby deny the Charging Party CDTOA's request that we require Respondent Unions to reimburse any owner-operators for payment of initiation fees and dues, deducted contributions to union benefit funds, or income lost by reason of the enforcement of unlawful terms in MLA art. XIII. The Board has on one occasion adopted without comment an administrative law judge's recommended Order containing such a remedy. *Local 814, Teamsters (Santini Brothers, Inc.), [208 N.L.R.B.] at 201. In the present case, however, no evidence has been introduced with respect to alleged losses directly attributable to actual coercion by Respondent Unions, nor has the remedial issue been expressly litigated. Furthermore, we find a reimbursement order, typically used to "make whole" employees* for violations of the Act, to be generally overly broad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators requested by CDTOA would not effectuate the remedial policies of the Act. *See Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, et al. v. N.L.R.B., 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961)." 248 N.L.R.B. at 817 n. 34.

[6]29 U.S.C. § 158(b)(4) (1976).

[7]The NLRB claims that the Board has "consistently" declined to grant make-whole remedies in cases involving only violations of § 8(e). For support, the NLRB relies on *Newspaper and Periodical Drivers and Helpers Union v. N.L.R.B.*, 509 F.2d 99 (9th Cir. 1974), *cert. denied*, 423 U.S. 831, 96 S.Ct. 51, 46 L.Ed.2d 48 (1975). In that case, however, the court merely held that the Board did not abuse its discretion in denying back pay to independent contractors terminated in violation of § 8(e). Moreover, the Board's own decision in *Newspaper Drivers* offers no explanation for denying a make-whole remedy. *See Newspaper and Periodical Drivers' and Helpers Union Local 921*, 204 N.L.R.B. 440, 448 (1973). Thus, neither the Board's decision, nor the Ninth Circuit's brief affirmance, provides support for a *per se* rule denying reimbursement in § 8(e) cases.

reimbursement is inappropriate in the absence of coercion. *See Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 655-56, 81 S.Ct. 875, 877-78, 6 L.Ed.2d 1 (1961).[8] But when an unlawful collective bargaining agreement is itself coercive, there is no logical reason for denying reimbursement because of the absence of a technical § 8(b)(4) violation. Article XIII presented the truck owners with the grim choice of joining the union or foregoing work with the signatory employers. Although the unions may not have employed coercive tactics, violative of § 8(b)(4), the inclusion of article XIII in the collective bargaining agreement would necessarily have had the effect of coercing otherwise reluctant truck owners to join the union.[9] *See Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1357 (9th Cir. 1970).

We are unable to distinguish this case from two cases in which the Board ordered restitution to parties who joined

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[8]In *Local 60*, the Board had ordered reimbursement of union fees and dues paid while an illegal closed-shop preferential hiring agreement remained in effect. The Court refused to enforce the Board's order because it found no evidence that union membership had been coerced. The Court emphasized that persons affected by the order were already union members when employed on the job in question, and that no one had joined the union specifically to obtain work on that job. 365 U.S. at 654, 81 S.Ct. at 877. Thus, *Local 60* is readily distinguishable from the case before us.

[9]The Board stated that "no evidence has been introduced with respect to alleged losses directly attributable to *actual* coercion by Respondent Unions." 248 N.L.R.B. at 817 n.34 (emphasis added). We read the Board's statement as merely a finding that the unions did not directly confront truck owners and force them to join the union. Admittedly, the statement might be interpreted as an evidentiary ruling that the truck owners offered no proof that individuals had joined the union as a result of article XIII, as was the case in *Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 81 S. Ct. 875, 6 L.Ed.2d 1 (1961). We doubt, however, that the Board intended that meaning, since the record shows that at every available juncture the truck owners fought the unions' attempt at unionization. *See Associated General Contractors of California, Inc. v. N.L.R.B.*, 564 F.2d 271 (9th Cir. 1977).

unions pursuant to illegal collective bargaining agreements.[10] *See Sheraton-Kauai Corp.*, 177 N.L.R.B. 25 (1969), *enforced*, 429 F.2d 1352, 1357-58 (9th Cir. 1970). *Local 814, Teamsters (Santini Brothers)* 208 N.L.R.B. 184 (1974), *enforced*, 546 F.2d 989 (D.C.Cir. 1976), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977).

In *Santini Brothers*, by staging a walkout, the union coerced the employer to accept a restrictive collective bargaining agreement; enforcement of that agreement, in turn, coerced independent truckers to join the union. The Board found violations of both § 8(b)(4) and § 8(e), and ordered reimbursement to the independent truckers.

We are not persuaded that the § 8(b)(4) violation in *Santini Brothers* justifies granting restitution in that case, while denying it here. The Board would have restitution turn on the union's use of a coercive tactic, violative of § 8(b)(4), to persuade the employer to accept a restrictive provision. The relevant inquiry, however, is whether the truck owners, irrespective of any coercion of the employer, were coerced into union membership by an unfair labor practice.

The Board implicitly recognized this principle in *Sheraton-Kauai*. In that case, the employer and union illegally extended a union security clause in a collective bargaining agreement to employees of a new hotel, thus denying the employees an opportunity to resolve the question of union representation for themselves. The union did not coerce the employer in violation of § 8(b)(4); nor did the union directly coerce the employees. Nonetheless, the Board ordered restitution after finding that, by "submitting [the employees] to the terms and conditions of the . . . agreement," the

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[10]The Board cannot arbitrarily impose different remedies in similar situations. *See Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C.Cir. 1966) ("nor can [the Board] treat similar situations in dissimilar ways").

union effectively coerced the employees into union membership. 177 N.L.R.B. at 29.

Reimbursement in this case, as in *Sheraton-Kauai* and *Santini Brothers*, would effectuate the policies of the Act by returning to the truck owners money paid to support a union they did not freely choose to join, and by depriving the unions of the benefit of their unfair labor practice. *See Virginia Electric and Power Company v. N.L.R.B.*, 319 U.S. 533, 541, 63 S.Ct. 1214, 1219, 87 L.Ed. 1568 (1943); *Graphic Arts International Union Local 280 v. N.L.R.B.*, 596 F.2d 904, 910 (9th Cir. 1979).[11]

B.

We find unpersuasive the other reasons offered by the Board for denying reimbursement.

First, we are confused by the Board's contention that the remedial issue was not expressly litigated. The truck owners raised the remedy issue in their brief to the Board as charging party. To the extent that factual issues remain — such as the amount of damages — they can be resolved in an NLRB proceeding. *See N.L.R.B. v. Local 776, Film Editors*, 303 F.2d 513, 521 (9th Cir.), *cert. denied*, 371 U.S. 826, 83 S.Ct. 47, 9 L.Ed.2d 65 (1962).

Next, the Board said that the truck owners had an alternative remedy under § 303. It would be wasteful and unfair to force the truck owners, who have opposed unionization

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[11]Counsel for the NLRB suggested that reimbursement would result in unjust windfalls to the truck owners who may have benefited from becoming signatories to the union. To the extent that the truck owners received actual benefits in return for their fees and dues, the value of these benefits may be deducted from the amount of reimbursable damages. We see no reason, however, to deny the truck owners the opportunity to show that they paid fees that did not lead to benefits. The issue whether fees and dues created comparable benefits remains to be litigated.

in legal proceedings for ten years, *see Asosociated General Contractors of California, Inc. v. N.L.R.B.*, 564 F.2d 271 (9th Cir. 1977), to renew the battle in a § 303 proceeding. Moreover, we see no reason to burden a federal district court with § 303 litigation, when reimbursement can be ordered in an NLRB proceeding. *Cf. Sheraton-Kauai Corporation v. N.L.R.B.*, 177 N.L.R.B. 25 (1969) (by implication) (ordering reimbursement where a § 303 remedy might have been available), *enforced*, 429 F.2d 1352 (9th Cir. 1970); *Local 814, Teamsters (Santini Brothers)* 208 N.L.R.B. 184 (1974) (same), *enforced*, 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977).

Finally, the Board noted that reimbursement orders are typically used to "make whole" *employees*. We note, however, that the Board has also ordered reimbursement for employers and independent contractors when to do so would effectuate the policies of the Act. *See, e.g., Graphic Arts International Union Local 280*, 235 N.L.R.B. 1084, 1085 (1978), *enforced*, 596 F.2d 904 (9th Cir. 1979) (employer); *Local 814, Teamster (Santini Brothers)* 208 N.L.R.B. 184 (1974), *enforced*, 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977) (independent contractors).

For these reasons we remand to the Board to fashion a make-whole remedy[12] or to show good cause why a make-whole remedy would not effectuate the purposes of the Act.[13] *See Acco Construction Equipment, Inc. v. N.L.R.B.*,

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[12]We express no opinion at this stage of the proceedings as to whether the Board should order compensation for lost income resulting from enforcement of article XIII. The Board shall consider this claim of the owner-operators on remand.

[13]We note that the D.C. Circuit recently affirmed the Board's denial of a make-whole remedy for dump truck owner-operators in *Building Material and Dump Truck Drivers v. N.L.R.B.*, 669 F.2d 759 at 765-767 (D.C.Cir. 1981). For the reasons expressed in text, we reach a different conclusion.

511 F.2d 848, 852 (9th Cir. 1975).

Order ENFORCED IN PART and REMANDED for consideration consistent with this opinion.

APPENDIX iv.

Decision and Order.

United States of America, Before the National Labor Relations Board.

Joint Council of Teamsters No. 42, and its Affiliated Local Unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs & Helpers, Local 692; Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982; Truck Drivers, Warehousemen and Helpers, Local 898; Teamsters & Warehousemen, Local 381, All Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Teamsters, chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

and

Associated General Contractors of California, Inc.; Building Industry Association of California, Inc.; Engineering Contractors Association, Inc.; Southern California Contractors Association and California Dump Truck Owners Association.

Case 21—CE—196,

and

Associated Independent Owner-Operators, Inc.

Case 21—CE—199.

Building Material and Dump Truck Drivers, Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Associated Independent Owner-Operators, Inc.

and

Irvine-Santa Fe Company Party to the Contract.
Case 21—CE—200.

Building Material and Dump Truck Drivers, Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
(Irvine-Santa Fe Company)

and

Associated Independent Owner-Operators, Inc.
Case 21—CC—2004.

Upon appropriate charges,[1] the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued an order consolidating cases, a consolidated complaint, and a notice of hearing on January 23,

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[1]The original charge in Case 21—CE—196 was filed on December 19, 1977, by California Dump Truck Owners Association (herein called CDTOA) against Joint Council of Teamsters No. 42, and its affiliated Local Unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs & Helpers, Local 692; Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen Helpers, Local 982; Truckdrivers, Warehousemen and Helpers Local 898; Teamsters & Warehousemen, Local 381; all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein collectively called Respondent Unions); and against Respondent Associated General Contractors of California, Inc.; Building Industry Association of California, Inc.; Engineering Contractors Association, Inc.; and Southern California Contractors Association (herein collectively called Respondent Associations). CDTOA filed a first amended charge in Case 21—CE—196 on December 23, 1977. The charge in Case 21—CE—199 was filed on January 3, 1978, by Associated Independent Owner-Operators, Inc. (herein called AIOO) against the Respondent Unions and the Respondent Associations. The charges in Cases 21—CE—200 and 21—CC—2004, involving the employer Irvine-Santa Fe Company (herein called Irvine), were filed on January 5, 1978, by AIOO against one of the Respondent Unions, Building Material and Dump Truck Drivers, Local 420 (herein called Respondent Local 420).

1979. Copies of the charges, complaint, and notice of hearing were duly served on Respondents.

The complaint alleged that Respondent Unions and Respondent Associations had violated Section 8(e) of the Act by entering into agreements whereby the employer-members of Respondent Associations have ceased or refrained, or agreed to cease or refrain, from doing business with other persons. The complaint alleged further that Respondent Local 420 had violated Section 8(b)(4)(ii)(A) of the Act. Respondents filed answers to the complaint and thereby denied the commission of any unfair labor practices.

On June 23, 1979, the parties in the consolidated cases executed a stipulation of facts and a motion to transfer proceedings to the Board in which the parties waived a hearing before an administrative law judge and agreed to submit the cases directly to the Board for findings of fact, conclusions of law, and a Decision and Order, based on a record consisting of the stipulation of facts and extensive exhibits attached thereto. On September 13, 1979, the Board approved the stipulation of the parties and transferred the proceedings to the Board. Thereafter, the General Counsel, CDTOA, Respondent Unions, Respondent Associations, and Respondent General Truck Drivers, Local 235, filed briefs with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the entire record stipulated by the parties[2] and the briefs filed by the parties, and hereby makes the following findings and conclusions:

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[2]On January 26, 1979, the United States District Court for the Central District of California issued an injunction against Respondents pursuant to a petition filed by the General Counsel under Sec. 10(1) of the Act. Copies of the pleadings, order, and all relevant documents filed by the parties have been attached as an exhibit to the stipulation of facts.

Findings of Fact

I. The Business of the Employers

Respondent Associations, comprised of various employers in the building and construction industry in southern California, engage in collective bargaining for and negotiate collective-bargaining agreements on behalf of their respective employer-members with various labor organizations, including Respondent unions. In the course and conduct of business operations, Respondent Associations, in the aggregate, annually purchase and receive goods, materials, and supplies valued in excess of $50,000 directly from suppliers outside the State of California.

Irvine is a general contractor in the building and construction industry in southern California. At all times material herein, Irvine has been engaged in a construction project in the city of Alhambra, California (herein called the Alhambra project), where it has subcontracted certain work to various subcontractors, including Pacific Railroad Constructors. In connection with its work as a subcontractor of Irvine on the Alhambra project, Pacific Railroad Constructors has purchased and received materials and supplies valued in excess of $50,000 directly from suppliers located outside the State of California.

The parties stipulated, and we find, that the employer-members of the Respondent Associations, including Irvine, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

The parties stipulated, and we find, that each of Respondent Unions is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.[3]

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[3]The stipulation of facts indicates that Respondent General Truck Drivers, Local 235, is now merged with and subsumed by Sales Drivers, Food Processors, Warehousemen & Helpers Local 952.

III. The Alleged Unfair Labor Practices

A. *The Issues*

1. Do certain sections pertaining to owner-operators in article XIII of Respondents' current collective-bargaining agreement violate the general prohibition in Section 8(e) of the Act?

(a) Are the owner-operators of for-hire dump trucks independent contractors or employees within the meaning of the Act?

(b) If the owner-operators are independent contractors, are the sections of article XIII which apply to them secondary in nature?

2. Is article XIII limited to construction jobsite work in a way which entitle it, even if secondary, to protection under the first proviso to Section 8(e) of the Act?

3. Has Respondent Local 420 violated Section 8(b)(4)(ii)(A) of the Act by engaging in threatening or coercive conduct with an object of forcing self-employed persons to join a labor organization?

B. *The Stipulated Facts*

On or about July 1, 1977, Respondent Associations, on behalf of their employer-members, including Irvine, entered into a Master Labor Agreement (herein called the MLA) with Respondent Unions. The MLA is effective from July 1, 1977, until June 15, 1980, and covers all of the southern California area except San Diego County.

The following sections of MLA article XIII, entitled "Owner-Operators," are at issue in this proceeding:

> 1302. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be

applicable to him except as provided elsewhere in this Article and except that in the event that it is determined that the services of an Owner-Operator were terminated without just cause, any payment for time lost shall be limited to the wage and fringe benefit payments provided in this Agreement, and shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that Owner-Operator shall not be subject to the provisions of Paragraph 201, sub-paragraph 201.1 through 201.7 inclusive.

1303. *Hiring:*

The Contractor or subcontractor shall make every reasonable effort to refer to the Local Union with area jurisdiction over the work all Owner-Operators or drivers of equipment for clearance before work begins; and, in any event, the Union shall be notified of the name and Social Security number of the Owner-Operator within forty-eight (48) hours after the Owner-Operator begins work on that job.

* * * *

1306. *Union Membership:*

(a) All employees who are presently members of a Local Union hereunder shall, as a condition of continued employment, maintain such membership in good standing.

(b) As a condition of continued employment, all employees covered by this Agreement shall on the 8th day after commencing employment under this Agreement, or the date of this Agreement, which ever is later, become and remain members of the Local Union in good standing.

1307. *Terminations:*

The Contractor or subcontractor will terminate the employment of any employee covered by this Agree-

ment after notice by the Union, or the Local Union with jurisdiction in the event such employees shall fail to comply with Section 1306 of this Article; provided that membership in the Union, or the Local Union with jurisdiction was available to such employee on the same terms and conditions generally applicable to other members, and the membership was not denied or terminated for reasons other than the failure of the employee to render the periodic dues, and the initiation fees uniformly required as a condition of acquiring and retaining membership. Such employee shall not be reemployed by the Contractor or subcontractor until the employee has paid or tendered to the Local Union with jurisdiction, any such initiation fee, reinitiation fee or dues accrued to date of termination.

* * * * *

1312. The provisions of this Article have been negotiated and agreed upon by and between the parties for the objects and purposes expressed in Paragraph 1313 of the Article. The parties have not undertaken to negotiate for the employees any profit whatsoever for the leasing and rental of the equipment they drive. On the contrary, compensation for the equipment shall be set by Agreement between the Contractor and the Owner-Operator at a level which will not circumvent or defeat the payment of wages, fringes and conditions of any employee covered by this Master Labor Agreement and which will assure compensation to the Owner-Operator of not less than the actual cost of operation of such equipment.

1313. It is further mutually understood and agreed that the intent of this Article is to assure the payment of wages, fringes, and conditions as provided in the Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes and conditions

as provided in this Master Agreement. Any such agreement, contract or arrangement presently in existence shall be abrogated upon the execution of this Agreement.

* * * * *

1314. It is further agreed that the Contractor will not devise or put into operation any scheme, whether herein enumerated or not to defeat the terms of this Article of this Master Agreement, nor shall any Owner-Operator's arrangement with a Contractor be terminated for the purpose of depriving any other employee of employment. In the event that the Contractor has available equipment, the Owner-Operator may be assigned to operate such equipment on the job during the period of the repair of the Owner-Operator's equipment and not to exceed that work shift and so long as no employee is laid off of provide work for such equipment.

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1317. It is understood by the parties that this Agreement provides for an Employer-Employee relationship between the Contractor or subcontractor and each Owner-Operator of equipment used hereunder.

1318. It is recognized that many Owner-Operators have executed "short-form" agreements with the Teamsters Union which incorporate by reference provisions of this Master Labor Agreement. The provisions of such "short-form" agreement shall be applicable to said Owner-Operators only in their capacity as employers, i.e., when such Owner-Operators are employing one or more employees. When Owner-Operators are working on a job covered by this Master Labor Agreement their employment shall be covered by the Owner-Operator clause of this Agreement.

1319. If a Contractor through the grievance procedure is found violating any portion of this Article, the Joint Adjustment Board or the Impartial Chairman, as described in Article V, shall require the Contractor

to immediately pay compensatory damages for each Owner-Operator with respect to whom the Contractor is in violation in an amount equal to the sum of Health and Welfare and Pension contributions, under the terms of this Agreement, for eight hours for each day or portion thereof the violation occurred such damages to be made payable to the Construction Teamsters Security Fund by check promptly mailed to the respective Local Union. The Joint Adjustment Board or Impartial Chairman may also grant such further relief as may be deemed appropriate.

* * * * *

1321. Notwithstanding any other provision of this Agreement, this Article XIII shall be applicable only to Owner-Operators performing (or who, upon their employment, will be performing) work to be done at the site of construction, alteration, painting or repair of a building, structure, or other construction work.

1321.1 The term "work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other construction work" as used in the Paragraph 1321 shall include all driving to, from and in connection with hauling materials to or from any source or disposal site on the one hand, and a geographical site of construction, on the other hand, in accordance with the following:

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1321.1.2 Hauling of materials between a primary location and a secondary location not excluded by Paragraph 1321.1.1 above[4] that is located five (5) or less

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[4]For unknown reasons, the complaint, stipulation of facts, and briefs fail to set forth the term of MLA paragraph 1321.1.1, which states:

1321.1.1 Delivery of materials to or from commercial suppliers or public dumps off the primary location shall always be exempt from the provisions of Article XIII. Any other general exclusions from the construction industry proviso, previously defined by the NLRB or the courts, shall continue to be applicable in interpreting Article XIII.

miles by the closest feasible means of access from the nearest boundary of the primary location shall be work to be done at the site, effective August 1, 1977.

1321.1.3 Hauling of material between a primary location and a secondary location located in excess of five (5) miles by the closest feasible means of access from the nearest boundary of the primary location shall not be work to be done at the site, effective August 1, 1977.

1321.2 Effective January 1, 1978, the mileage outlined in Paragraphs 1321.1.2 and 1321.1.3 will be increased to six (6). Effective July 1, 1978, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to seven (7). Effective January 1, 1979, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to eight (8). Effective January 1, 1979, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to nine (9). Effective January 1, 1980, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to ten (10).

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1321.5 It is expressly understood that if a haul is covered by the terms of this Section, all time spent on any public road shall be covered as well as all other time spent in connection with such haul.

1321.6 The Owner-Operator shall become a bona-fide employee as defined in Paragraphs 1301 and 1302 upon reporting for work on the first day on that job, such employee status to be effective from the first hour of work performed.

The parties agree that the foregoing provisions of the MLA apply to the owner-operators of dump truck equipment who perform certain hauling services within the geographic area covered by the MLA for the construction contractors

who are employer-members of Respondent Associations.[5] Although contractors have in some instances used their own driver-employees in company-owned trucks to haul material to and from construction sites, they usually must engage dump truck owner-operators to perform such work. On occasion, a contractor may deal directly with and be billed directly by an owner-operator for a particular job, but the prevalent practice for the procurement of an owner-operator's services involves a tripartite relationship among the contractor, owner-operator, and a trucking broker known as an overlying carrier. Under a typical arrangement, a contractor contracts with an overlying carrier for the provision of needed transportation services. The overlying carrier then performs such services either by using his own equipment, vehicles, and employee-drivers, or by using owner-operators with whom the overlying carrier has executed subhaul agreements.

An overlying carrier commonly has subhaul agreements with numerous owner-operators. In turn, an individual owner-operator usually has subhaul agreements with several overlying carriers. A construction contractor, however, ordinarily has no direct agreement with an owner-operator and no control over an overlying carrier's selection of the owner-operator who will work for the contractor. Although bound by subhaul agreement, an owner-operator is free to refuse an overlying carrier's job referral, to leave a job prior to its completion, or to substitute another owner-operator in his

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[5]These and similarly occupied owner-operators elsewhere in California have been the subject of considerable litigation, hereinafter discussed, before the Board and the courts of appeals. In reference to prior litigation, the parties herein agree that the evidence adduced at a Board representation case hearing in Case 21—RD—1008 remains unchanged and applicable to the determination of the owner-operators' present employment status. The evidence in this proceeding accordingly includes both an extensive statement of stipulated facts and the record from Case 21 — RD — 1008, which is attached as an exhibit to the stipulation.

stead. Pursuant to one or more subhaul agreements, an owner-operator may work on several different jobsites for several different contractors within a week or even a single day.

Whenever an owner-operator's vehicle travels in excess of 50 feet along a public highway, the activities of the owner-operator and overlying carrier are regulated by the California Public Utilities Commission (PUC), which establishes minimum tariffs designed to reflect the costs of both labor and equipment use for any job. The requirements of a particular job, however, may result in trilateral negotiations for the payment of a rate higher than the PUC minimum. When an overlying carrier refers an owner-operator to a contractor for a job, the overlying carrier bills and collects sums due from the contractor, deducts 5 percent as a brokerage fee, and transmits the remainder to the owner-operator. Whether the mode of payment is direct from contractor to owner-operator or through an overlying carrier, an owner-operator keeps his own record for billing purposes of time spent on the job and submits a freight bill based on that record to the appropriate parties. (Some contractors use an employee designated as a "load checker" to maintain a separate record of an owner-operator's hours for purposes of verifying the freight bill's accuracy.) An owner-operator is generally paid in gross, with no deductions for taxes or benefit payments, and only for hours when his equipment is in actual use. In contrast, employee-drivers of a contractor receive hourly-based net wages for the duration of a fixed workday, even if their company-owned vehicles are not operating at all times.

The dump truck equipment used by an owner-operator in the performance of services for construction contractors varies, but may include a tractor, a semitrailer unit, a truck and transfer trailer, a tractor with a bottom dump trailer, a semibottom dump trailer, or a truck and pup trailer, All

owner-operators own at least one power unit. Additional power, trailer or service equipment may be purchased or leased. An owner-operator is responsible for all costs of owning, operating, maintaining, or repairing any equipment used. These costs include the basic expense of financing equipment purchases or leases and the additional expenses entailed by, *inter alia*, PUC permit, bonding, and liability insurance requirements, California licensing fees, federal and state income taxes, Federal highway use taxes, and any traffic violations.

A contractor may use the services of a dump truck owner-operator for a variety of construction projects, including the construction of highways, residential or commercial structures, underground passageways, and overhead bridges. Whatever the project, owner-operators participate in the loading, hauling, and unloading of materials between two sites. In some instances, an owner-operator's activities take place entirely within the physical confines of the construction project, herein called the geographical site of construction.[6] In other instances, an owner-operator must haul materials along a private or public right-of-way between the geographical site of construction and a remote location.[7] If the latter type of haul originates at the site of construction, it typically involves hauling excess excavated materials or refuse to a remote dumping location which may be either a public dump or a site opened by the contractor specifically for the construction project, or hauling broken asphalt to a

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[6]The stipulation of facts defines the geographical site of construction as "including contiguous lands temporarily used during the construction, upon which the final highway, road, structure, building, conduit, canal, channel, bridge or other things will be located after that construction activity is complete."

[7]As used in the stipulation of facts, the term "remote" applies to a location which is physically separated from the geographical site of construction by more than the width of a public road.

crushing facility where the material's components are separated for reuse. If the haul terminates at the geographical site of construction, it typically involves hauling material from a remote "borrow pit" opened by the contractor specifically to obtain materials needed for a construction project, or hauling materials from a remote commercial source of supply such as a rock crushing plant, asphalt supplier, sand pit, or dirt pit. In addition to the foregoing, an owner-operator may haul material such as dirt from the contractor's geographical site of other construction, which may or may not involve the same contractor.[8]

Whether at the geographical site of construction or at a remote "borrow pit" established by a contractor, an employee of the contractor, usually a member of the Operating Engineers Union, operates a skip-loader or other equipment to load material into an owner-operator's dump truck. At a remote commercial source of supply, the commercial vendor's employee, who may or may not be a member of any labor organization, loads the owner-operator's truck by methods which vary according to the material involved. The method of unloading materials at any site also varies, depending upon the type of dump truck, the type of material hauled, and—at a geographical site of construction—the nature of the construction project. An owner-operator knows from experience to dump a load as closely as possible to where a bulldozer operator or grader operator, usually a member of Operating Engineers, is working. During loading or unloading procedures, the owner-operator ordinarily remains in his vehicle and does not converse with any em-

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[8]Employee-drivers of a contractor also perform all of the types of hauls described. The record indicates, however, that although employee-drivers of contractors in Respondent Associations operate loading equipment, pickup trucks, water trucks, and flatbed trucks, they do not usually drive the kind of dump truck equipment used by owner-operators.

ployee on the site. The owner-operator is solely responsible for the operation of his truck, but he may receive general instruction from a construction project superintendent or directional signals from a contractor's employee-flagman, who is usually a member of the Laborers Union. At any geographical site of construction or remote location, actual loading times vary in average from 1 to 7 minutes and actual unloading times average 3 minutes or less. The total amount of time spent at any location by the owner-operator may vary depending upon, *inter-alia*, waiting time. A contractor utilizing an owner-operator's services is cost-motivated to insure that the owner-operator spends an absolute minimum of time per haul. In this regard, a contractor normally tries to locate a remote source of supply or dumping site as close as possible to the geographical site of construction. A contractor may also designate the route to be traveled to and from the geographical site of construction, although owner-operators are often free to choose their own route. The owner-operator ordinarily drives at approximately 30 miles per hour on public roads but more slowly on undedicated roads, so that travel time between a geographical site of construction and a remote site 5 miles away would average 25 minutes.

In reference to the relationship between the aforementioned provisions of MLA article XIII and the aforementioned activities of California dump truck owner-operators, the parties have placed into evidence and stipulated the credibility of sworn affidavits given by Gary Hope, a project superintendent for MLA signatory construction contractor Irvine, and Lendelle Kinder, a dump truck owner-operator. Hope stated that during the first week of December 1977, he had a conversation with Charles Tanberg, business agent for Respondent Local 420, at Irvine's Alhambra, California, construction site. Tanberg told Hope in this conversation

that the MLA required all truckdrivers on Irvine's job, including owner-operators, to join the Teamsters. Thereafter, Hope, stated, he observed Tanberg stopping trucks on December 22, 1977, in the loading area at the Alhambra jobsite and talking to the drivers. Later in the morning, Hope learned that one of Irvine's foremen had permanently "signed out" some truckdrivers because they were not members of the Teamsters. After futile attempts to secure more trucks, Hope called an overlying carrier and "told him not to send any more truckers unless they were members of the Teamsters."

Kinder's affidavit corroborates Hope's statement. According to Kinder, he was working as an onwer-operator driver at Irvine's Alhambra jobsite on December 22, 1977, when Tanberg asked to see his Teamsters card. During the ensuing conversation, Tanberg indicated to Kinder that he would not be continuing his work for Irvine because he was not a union members. At the end of the day, Kinder was told by Irvine's foreman not to return on the following morning, in spite of the availability of additional work, because of the "union problem."

C. *Contentions of the Parties*

The General Counsel, CDTOA, and Respondent Associations all contend that the provisions of MLA article XIII set forth in full above are proscribed by Section 8(e) of the Act. Specifically these parties argue that article XIII applies to owner-operators who are independent contractors, is secondary in nature, and is not privileged by the construction industry proviso to Section 8(e) because it is not limited to construction jobsite work. The General Counsel further contends that Respondent Local 420 has threatened, coerced, and restrained owner-operators who are independent contractors of Irvine with an object of forcing or requiring them to join a union, in violation of Section 8(b)(4)(ii)(A) of the Act.

With respect to both the alleged 8(e) and 8(b)(4)(ii)(A) violations, Respondent Unions contend that the dump truck owner-operators at issue are employees rather than independent contractors. Respondent Unions therefore contend that article XIII and the alleged conduct of Respondent Local 420 must be considered primary and lawful in nature when applied to owner-operators *qua* employees of the employer-members of Respondent Associations. Even if the Board finds the owner-operators to be independent contractors, Respondent Unions assert that article XIII is properly limited to jobsite work and entitled to the protection of the construction industry proviso.

D. *Discussion and Conclusions*

1. The alleged 8(e) violation

Section 8(e) of the Act forbids entry into a collective-bargaining agreement whereby an employer agrees to refrain from dealing in the product of another employer or to cease doing business with any other person.[9] It is well established, however, that contract clauses which may technically fall within the literal proscription of Section 8(e) are not unlawful if the clauses are found to have the primary objective

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[9]The actual text of Sec. 8(e) provides in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .

of preserving or protecting work performed by the contracting employer's employees.[10] Furthermore, even clauses which are secondary in nature and within the general proscription of Section 8(e) may be lawful and protected if they satisfy the requirements for exemption under the construction industry proviso to Section 8(e).

The complaint alleges that the several cited paragraphs of article XIII in Respondents' MLA violate Section 8(e) because they require signatory employers to cease doing business with dump truck owner-operators who are independent contractors on any terms other than those applicable to unit employee-drivers under the MLA. In determining the merits of the complaint, we are faced with the threshold question whether the owner-operators actually are independent contractors, rather than employees, when working for the employer-members of Respondent Association.[11] If the owner-operators are employees within the meaning of the Act, then article XIII is primary in scope and the complaint must be dismissed.

As indicated in the previous section of this Decision, the Board is no stranger to proceedings involving the employment status of these owner-operators. In 1971, petitions were filed in Cases 21—RD—1008 and 20—RD—721 to decertify the Teamsters Unions as representatives of the dump truck owner-operators within the Unions' respective southern and northern California jurisdictions. After separate hearings, the Board consolidated the two representation

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[10]*National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967).

[11]Under Sec. 2(3) of the Act, the term "employee" does not include "any individual having the status of an independent contractor." General agency principles, paramount among which is the "right-to-control" test, apply to the determination of whether an individual is an employee or independent contractor. *N.L.R.B. v. United Insurance Company*, 390 U.S. 254 (1968).

cases for issuance of a Decision and Order finding the owner-operators to be employees.[12] Subsequent to hearings on additional matters, the Board issued a Supplemental Decision and Direction of Election in each of the representation proceedings.[13] Before the directed elections could be conducted, the Teamsters and various employer associations in the California construction industry executed new collective-bargaining agreements for both southern and northern California. As a result, parallel unfair labor practice charges were filed with the Board alleging violations of Section 8(a)(2) and (1) of the Act and "blocking" further processing of the representation cases. The Board thereafter issued a Decision and Order adopting an administrative law judge's findings that the alleged unfair labor practices had been committed.[14]

Upon a petition for enforcement and a cross-petition for review, the United States Court of Appeals for the Ninth Circuit denied enforcement of the Board's Order because it found, contrary to the Board, that the owner-operators were independent contractors who were not properly part of any employee unit.[15] Upon remand of the unfair labor practice case from the court, the Board consolidated it with the representation cases still pending and issued a Supplemental Decision and Order finding "pursuant to law of the case" that the dump truck owner-operators were independent contractors, not employees.[16] Prior inconsistent Decisions were

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[12]*Contractor Members of the Associated General Contractors of California, Inc.*, 201 NLRB 311 (1973).

[13]*Contractor Members of the Associated General Contractors of California, Inc.*, 209 NLRB 363 (1974); 209 NLRB 366 (1974).

[14]*Associated General Contractors of California, Inc., et al.*, 220 NLRB 540 (1975).

[15]*Associated General Contractors of California, Inc. v. N.L.R.B.*, 564 F.2d 271 (1978).

[16]*Associated General Contractors of California, Inc., et al.*, 239 NLRB No. 100 (1978).

vacated and all proceedings were dismissed.

Notwithstanding the foregoing history of litigation, Respondent Unions seek *de novo* consideration of the dump truck owner-operators' status in the present case and urge the Board to find these individuals to be employees. We do not regard such a course of action as appropriate. In the prior representation case and unfair labor practice case litigation, the same parties as are involved herein, or their privies, were present and fully litigated the identical issue of employment status considered herein. Moreover, there has been no significant change in the nature of the owner-operators' work since that litigation terminated. Accordingly, under established principles of *res judicata* and collateral estoppel, the final and conclusive finding in the prior cases that the dump truck owner-operators are independent contractors is controlling in this proceeding.[17]

The owner-operator provisions of MLA article XIII, paragraphs 1302, 1303 1306, 1307, 1312-19, and 1321.6, require all employer-members of Respondent Associations to cease doing business with dump truck owner-operators who do not become union members and employee-drivers subject to all terms of the MLA. Such provisions, applied to individuals whom we have found to be independent contractors, are secondary on their face.[18] They are designed to

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[17]See, e.g., *Graneto-Datsun, A Graneto Company*, 220 NLRB 399 (1975); *International Longshoremen's and Warehousemen's Union, et al. (California Cartage Company, Inc.)*, 215 NLRB 541, 542 (1974); *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (New York Telephone Company)*, 197 NLRB 866, 867-868 (1972).

[18]*Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Brothers, Inc.)*, 208 NLRB 184, 198-200 (1974); *Newspaper & Periodical Drivers' & Helpers Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (San Francisco Newspaper Printing Co., Inc.)*, 204 NLRB 440 (1973); *Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; et al. (S & E McCormick,*

serve the general institutional interests of Respondent Unions in organization rather than any specific legitimate interests of bargaining unit employees in unit work preservation.[19] Accordingly, we find that the aforementioned provisions of MLA article XIII violate Section 8(e) of the Act, unless they are entitled to protection under the construction industry proviso.

The critical inquiry with respect to the applicability of the construction industry proviso to article XIII concerns whether that article covers only "work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." All parties agree that article XIII, on its face and in practice, applies to transportation work performed by dump truck owner-operators off the geographical site of construction. The General Counsel and CDTOA contend that such coverage *per se* exceeds the jobsite limitation, as it has been defined in legislative history and Board precedent. Respondent Unions argue, however, that offsite work should be considered jobsite work within the meaning of the proviso if it involves only the transportation of materials between a contractor's geographical site of construction and a remote dumping or supply site established up to 10 miles away by the contractor

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Inc.). 199 NLRB 31 (1972); *Milk Wagon Drivers and Creamery Workers Local Union No. 66 of Seattle, Washington and Vicinity, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Carnation Company)*, 181 NLRB 882, 886 (1970); *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; et al. (J. K. Barker Trucking Co.)*, 181 NLRB 515, 520-521 (1970); and see *A. Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772 (3d Cir. 1967).

[19]We note that none of Respondents have even argued in their briefs that the owner-operator provisions have a valid work preservation purspose if the dump truck owner-operators are in fact independent contractors.

for exclusive use in connection with work at the geographical site of construction. They further contend that article XIII applies only to the owner-operators' jobsite work, as so defined.[20]

The legislative history of Section 8(e) and its construction industry proviso is sparse in references to the precise definition of jobsite work intended by Congress. In this regard, the House Conference report stated only that:

> It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from Section 8(e) agreements relating to supplies and materials or other products shipped or otherwise transported to, and delivered, on the site of construction.[21]

In addition, the legislative history more generally suggests that a primary motivation for the enactment of the proviso was the desire to prevent potential labor strife between union and nonunion personnel working at the same jobsite.[22]

Interpreting legislative intent from the foregoing, the Board has consistently adhered to a narrow definition of jobsite work when evaluating contractual provisions on a case-by-

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[20]Respondent Associations admit that Art. XIII is not limited to jobsite work within the meaning of the Act. They urge the Board to articulate a "majority time" jobsite definition which would apply to all transportation work by the owner-operators herein if a majority of each day's working time is spent at the geographical site of construction and/or at a contractor-controlled remote site where the contractor's own employees are also working.

[21]H. Conf. Rept. 1147, 86th Cong., 1st sess., p. 39; Leg. Hist. 943. See also the legislative history set forth in *Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Cardinal Industries, Inc.)*, 136 NLRB 977, 988-989 (1962).

[22]See, e.g., the discussion of legislative history in *International Union of Operating Engineers, Local Union No. 12, AFL-CIO (Robert E. Fulton)*, 220 NLRB 530, 536 (1975).

case basis. It has found that the proviso clearly does not extend to offsite work merely because such work *could be done* at the site of construction.[23] Furthermore, the Board has refused in several cases to apply the proviso's coverage to various types of transportation work wherein deliveries have been made directly on the geographical site of construction. In particular, the Board has found that none of the following constitutes jobsite work: the mixing, delivery, and pouring of ready-mix concrete;[24] the delivery of precast concrete pipe;[25] the "bringing of tools, materials, and personnel to and from the site of construction";[26] and the delivery of sand landfill.[27]

We must evaluate the work coverage provisions of MLA article XIII, contained in paragraph 1321 and subparagraphs thereto, in light of the foregoing legislative history and precedent. Without the limitations on coverage stated in subparagraph 1321.1.1, the remainder of paragraph 1321 would on its face apply the secondary provisions of article XIII to non-jobsite work. Specifically, the owner-operator provisions would without subparagraph 1321.1.1 cover the offsite transportation of all materials between a geographical

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[23]*Ohio Valley Carpenters District Council (Cardinal Industries), supra* at 988.

[24]*International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 294 (Island Dock Lumber, Inc.),* 145 NLRB 484 (1963); *Teamsters Local Union No. 559, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Connecticut Sand and Stone Corporation),* 138 NLRB 532 (1962).

[25]*Joint Council of Teamsters No. 42, et al. (Inland Concrete Enterprises, Inc.),* 225 NLRB 209 (1976).

[26]*Local Union No. 282, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (D. Fortunato, Inc.),* 197 NLRB 673 (1972).

[27]*Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Clemence D. Stanton, d/b/a/ Rexforo Sand and Gravel Co.),* 195 NLRB 378, (1972).

site of construction and any remote location within an area expanding from 5 to 10 miles away from the site during the life of the MLA. Article XIII would then not be entitled to protection under the construction industry proviso, because it would clearly apply to the various types of transportation work defined as offsite work by the Board in the cases cited in the preceding paragraph.

Subparagraph 1321.1.1, however, states that article XIII does not apply to the "delivery of materials to or from commercial suppliers or public dumps."[28] As indicated in the preceding section of this Decision, the parties have inexplicably failed in the complaint, stipulation of facts, and briefs to refer to the express terms of subparagraph 1321.1.1. Respondent Unions nevertheless implicitly rely upon the limiting language of this subparagraph by admitting in their brief that neither the delivery of materials from a remote commercial source to the geographical site of construction nor the cartage of materials away from the geographic site to a remote commercial dumping site constitutes jobsite work within the meaning of the Act and the MLA. We agree, and find that subparagraph 1321.1.1 on its face so limits article XIII as to exclude from its coverage such offsite

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[28]Subparagraph 1321.1.1 also states that "[a]ny other general exclusions from the construction industry proviso, previously defined by the NLRB or the courts, shall continue to be applicable in interpreting Article XIII." We give no weight to this language. An explicit, self-contained, and clearly illegal contractual provision, such as the secondary owner-operator provision herein, will not be purged of its illegality by a vague and general "savings clause." See *The Essex County and Vicinity District Council of Carpenters and Millwrights, United Brotherhood of Carpenters and Joiners of America, AFL—CIO (Associated Contractors of Essex County, Inc.)*, 141 NLRB 858, 869 (1963); *Perry Coal Company, Midwest-Radiant Corporation, and Peabody Coal Company*, 125 NLRB 1256 (1956).

construction work.[29]

Notwithstanding the limitation expressed in subparagraph 1321.1.1, we find that paragraph 1321 in its entirety clearly extends the coverage of article XIII to nonjobsite work. Paragraph 1321 does not, in fact, conform to the jobsite definition advocated by Respondent Unions, because it does not restrict article XIII to the transportation of materials between a contractor's geographical site of construction and a remote location *controlled by the same contractor* for use in connection with work at the geographical site of construction. On the contrary, article XIII undisputedly covers dump truck owner-operators who are engaged in the transportation of materials between different contractors' geographical sites of construction. Such hauls may include the transportation of materials to or from, as well as the loading or dumping of materials on, a jobsite controlled by a nonunion contractor. The Board has twice refused to broaden the jobsite definition under the construction industry proviso to permit application of a contract's secondary provisions to work performed for a subcontractor at a remote location established exclusively or partially to service a contractor's geographical site of construction.[30] If remote locations not controlled by the contractor for a geographical site of construction cannot be viewed as extensions of the contractor's

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[29]Although it is unnecessary to refer to extrinsic evidence for interpretation of an unambiguous contractual provision, we note that our view of the restrictive import of subparagraph 1321.1.1 is supported by the affidavit of George A. Pappy, submitted by Respondent unions during the injunction proceeding before the district court. On the other hand, other witness affidavits submitted in that proceeding indicate that Respondent Unions have ignored the subparagraph's limitations in their efforts to enforce art. XIII.

[30]*Operating Engineers, Local Union No. 12 (Robert F. Fulton), supra; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Bigge Drayage Company)*, 197 NLRB 281 (1972).

jobsite, and we reaffirm that they cannot whether or not they are themselves actual construction sites, then the transportation of materials between such sites is no different than the transportation of materials between a geographical site of construction and a remote commercial supply or dumping location. As previously stated, the Board has consistently held that such work is not jobsite work.

Even if we were to accept the premise that article XIII covers only the transportation of materials between sites up to 10 miles apart but controlled by the same contractor, we would find such coverage to be overbroad. Based on the parties' estimates of average times involved, article XIII would apply to an owner-operator who in the course of a 10-mile roundtrip haul spends an average of 10 minutes combined at the geographical site of construction and the remote location and an average of 50 minutes in offsite travel. The primary purpose of the construction industry proviso—to avoid tensions among groups of employees at the same site—has little relevance to persons having such incidental contact with the site. The legislative history of the proviso demonstrates that Congress shared this conclusion by expressing its specific intent to extempt from the proviso the total process of transporting materials in spite of the fact that some tasks in that process might take place on a construction jobsite.[31] Consistent with this intent, the Board has repeatedly held that the proviso does not apply to jobsite deliveries (or, by logical inference, pickups) which are only a small part of basically offsite transportation activity. In the present case, we perceive no justification for departing from this well-established precedent merely be-

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[31]*Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Reynolds Electrical and Engineering Co., Inc.),* 154 NLRB 67, 95 (1965).

cause the transportation activity takes place between and involves brief work on two sites controlled by the same construction contractor.[32] The secondary owner-operator provisions of articles XIII clearly extend to predominately offsite transportation work performed by dump truck owner-operators. We find that such work is not jobsite work within the meaning of the construction industry proviso.[33]

For the foregoing reasons, we find that the secondary provisions of article XIII are not entitled to protection under the construction proviso. Accordingly, we find that those provisions violate Section 8(e) of the Act.

2. The alleged 8(b)(4)(ii)(A) violation

Uncontroverted record evidence conclusively demonstrates that Respondent Local 420, through its business agent, Charles Tanberg, threatened a self-employed dump truck owner-operator, Lendelle Kinder, with loss of a job at the Alhambra, California, jobsite of construction contractor Irvine unless Kinder would become a member of Local 420. The evidence further shows that Respondent Local 420, through Tanberg, coercively insisted that Irvine cease doing business with independent contractors who were not and

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[32]We reject Respondent Unions' argument that the definition of jobsite work in the proviso to Sec. 8(e) should be identical to the definition of jobsite work in the Davis-Bacon Act. That Act, as a remedial statute, is broader in coverage than the 8(e) proviso. *International Union of Operating Engineers, Local Union No. 12 (Acco Construction Equipment, Inc.)*, 204 NLRB 742 (1973); *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers, Local Union No. 695, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. N.L.R.B.*, 361 F.2d 547, 553 (D.C. Cir. 1966).

[33]We leave open the question whether, if ever, the definition of jobsite work under the proviso may include the brief and incidental transportation of materials between two proximate, but not physically contiguous, geographical sites of construction, each of which is exclusively controlled by the same contractor.

would not become members of Local 420. Based on such evidence, we find that Respondent Local 420 has threatened, coerced, and restrained Irvine and the independent contractors of Irvine with an object of forcing or requiring the independent contractors to join a labor organization, in clear violation of Section 8(b)(4)(ii)(A) of the Act.

The Remedy

Having found that Respondents have engaged in unfair labor practices, we shall order them to cease and desist therefrom and to take certain affirmative action to effectuate the purpose of the Act.[34]

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, we make the following:

Conclusions of Law

1. The employer-members of Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association, Inc., and Southern California Contractors Association are

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[34]We hereby deny the Charging Party CDTOA's request that we require Respondent Unions to reimburse any owner-operator for payment of initiation fees and dues, deducted contributions to union benefit funds, or income lost by reason of the enforcement of unlawful terms in MLA art. XIII. The Board has on one occasion adopted without comment an administrative law judge's recommended Order containing such a remedy. *Local 814, Teamsters (Santini Brothers, Inc.), supra* at 201. In the present case, however, no evidence has been introduced with respect to alleged losses directly attributable to actual coercion by Respondent Unions, nor has the remedial issue been expressly litigated. Furthermore, we find a reimbursement order, typically used to "make whole" *employees* for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators requested by CDTOA would not effectuate the remedial policies of the Act. See *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL—CIO, et al. v. N.L.R.B.*, 365 U.S. 651 (1961).

employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The following organizations are labor organizations within the meaning of Section 2(5) of the Act: Joint Council of Teamsters No. 42, and its affiliated Local Unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs & Helpers, Local 692; Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982; Truckdrivers, Warehousemen and Helpers, Local 898; Teamsters & Warehousemen, Local 381; all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

3. By threatening, coercing, and restraining persons engaged in commerce, including Irvine-Santa Fe Company and the independent contractors of Irvine, with an object of forcing or requiring the independent contractors of Irvine to join a labor organization, Building Material and Dump Truck Drivers, Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, has engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(A) of the Act.

4. By entering into, maintaining, and giving effect to the aforementioned paragraphs in article XIII of the Master Labor Agreement between Respondent Associations and Respondent Unions, Respondents have engaged in unfair labor practices in violation of Section 8(e) of the Act.

5. The above unfair labor practices are unfair labor practices affecting commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Building Material and Dump Truck Drivers, Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from threatening, coercing, and restraining Irvine-Santa Fe Company or the independent contractor dump truck owner-operators of Irvine with an object of forcing or requiring the owner-operators to join a labor organization.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix A."[35] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by said Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

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[35]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

. . . .

Note that appendices to the Board's decision are not reproduced in this Appendix ii.

(b) Sign and mail to said Regional Director sufficient copies of the aforementioned notice for posting at the premises of Irvine-Santa Fe Company, if willing.

(c) Notify the Regional Director for Region 21, in writing within 20 days from the date of this Order, what steps the Respondent Local 420 has taken to comply herewith.

B. Respondents Joint Council of Teamsters No. 42, and its affiliated Local Unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs & Helpers, Local 692; Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982; Truckdrivers, Warehousemen and Helpers, Local 898; Teamsters & Warehousemen, Local 381; all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, their officers, agents, and representatives, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing the provisions of article XIII in their 1977-80 Master Labor Agreement with Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association, Inc., and Southern California Contractors Association, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls copies of the attached notice marked "Appendix B."[36] Copies of

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[36]See fn. 35, *supra*.

said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondents' representative, shall be posted by said Unions immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Unions to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to said Regional Director sufficient copies of the aforementioned notice for posting at the premises of Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association, Inc., and Southern California Contractors Association, and their employer-members, if willing.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Unions have taken to comply herewith.

C. Respondents Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association, Inc., and Southern California Contractors Association, and their employer-members, their officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing the provisions of article XIII in their 1977-80 Master Labor Agreement with the Respondent Unions, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their places of business copies of the attached notice marked "Appendix C."[37] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by representatives of the Respondent Associations, shall be posted by the Associations and their employer-members immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Associations and their employer-members to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent Associations have taken to comply herewith.

Dated, Washington, D.C. March 31, 1980.

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[37]See fn. 35, *supra*.

APPENDIX v.

29 U.S.C. § 152(3)

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

29 U.S.C. § 158(b)(4)

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are en-

gaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

29 U.S.C. § 158(e)

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b)(4) (B) of this section

the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

29 U.S.C. § 160(c)

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and

rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

APPENDIX vi.

Article xiii

Owner-Operator

1300. Owner-Operator is an individual that holds legal or registered title to a motor vehicle or to the power equipment unit thereof in his name and who personally drives such vehicle or unit in the performance of work covered by this Agreement.

1301. The Contractor expressly reserves the right to control the manner, time, means and details of, and by which the Owner-Operator performs his services, as well as the ends to be accomplished, and shall be the sole judge of the capability of the Owner-Operator's equipment to perform the work required to be performed and may if the Contractor determines that the Owner-Operator's equipment is no capable of performing the work required to be performed, terminate such Owner-Operator's services; provided, however, that the Owner-Operator may file and process a grievance under paragraph 1319 hereof on the grounds that the Contractor's determination that the Owner-Operator's equipment is inadequate was a pretext for terminating the Owner-Operator's services. Failure to work the day or one-half (½) day out, as directed, shall terminate the Owner-Operator's employment and he shall be paid only for actual time worked prior to such failure. The Contractor shall not pay for time spent by the Owner-Operator in repairing, servicing, or maintaining his equipment after termination of employment or before or after his shift, or half-shift, as the case may be.

1302. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be applicable to

him except as provided elsewhere in this Article and except that in the event that it is determined that the services of an Owner-Operator were terminated without just cause, any payment for time lost shall be limited to the wage and fringe benefit payments provided in this Agreement, and shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that Owner-Operator shall not be subject to the provisions of paragraph 201, sub-paragraph 201.1 through 201.7.1 inclusive.

1303. Hiring:

The Contractor or subcontractor shall make every reasonable effort to refer to the Local Union with area jurisdiction over the work all Owner-Operators or drivers of equipment for clearance before work begins; and, in any event, the Union shall be notified of the name and social security number of the Owner-Operator within forty-eight (48) hours after the Owner-Operator begins work on that job.

1304. The equipment usage rate shall be set by agreement between the Owner-Operator and the Contractor. Equipment usage is the amount agreed between the Contractor and the Owner-Operator for the use of his equipment. Separate checks shall be issued by the Contractor for (a) wages and (b) equipment usage. Wages, fringes, payroll taxes and subsistence when applicable shall be paid in addition to the equipment usage amount referred to herein.

1305. Upon request of the Union, the Contractor shall make available a copy of his equipment usage agreement with the Owner-Operator.

1306. Union Membership:

(a) All employees who are presently members of a Local Union hereunder shall, as a condition of continued employment, maintain such membership in good standing.

(b) As a condition of continued employment, all employees covered by this Agreement shall on the 8th day after commencing employment under this Agreement, or the date of this Agreement, whichever is later, become and remain members of the Local Union in good standing.

1307. Terminations:

The Contractor or subcontractor will terminate the employment of any employee covered by this Agreement after notice by the Union, or the Local Union with jurisdiction in the event such employee shall fail to comply with Section 1306 of this Article; provided that membership in the Union, or the Local Union with jurisdiction was available to such employee on the same terms and conditions generally applicable to other members, and the membership was not denied or terminated for reasons other than the failure of the employee to render the periodic dues, and the initiation fees uniformly required as a condition of acquiring and retaining membership. Such employee shall not be reemployed by the Contractor or subcontractor until the employee has paid or tendered to the Local Union with jurisdiction, any such initiation fee, re-ininiation fee or dues accrued to date of termination.

1308. No provision of other articles of this Agreement shall be interpreted as requiring payments for the use, maintenance or servicing of the Owner-Operator's equipment.

1309. Compensation for the equipment shall be by check, paid monthly, for the full amount due, less any agreed advances. A statement of any charges by the Employer shall be issued at the same time.

1310. The Owner-Operator shall provide and shall have sole responsibility for gasoline, oil, grease, tires, tubes, repairs and any other items necessary to operate his equipment. He shall have complete freedom to purchase any such

items at any place where efficient service and satisfactory products can be obtained at the most favorable prices.

1311. There shall be no interest or handling charge on earned money advances prior to the regular pay day.

1312. The provisions of this Article have been negotiated and agreed upon by and between the parties for the objects and purposes expressed in Paragraph 1313 of the Article. The parties have not undertaken to negotiate for the employees any profit whatsoever for the leading and rental of the equipment they drive. On the contrary, compensation for the equipment shall be set by Agreement between the Contractor and the Owner-Operator at a level which will not circumvent or defeat the payment of wages, fringes and conditions of any employee covered by this Master Labor Agreement and which will assure compensation to the Owner-Operator of not less than the actual cost of operation of such equipment.

1313. It is further mutually understood and agreed that the intent of this Article is to assure the payment of wages, fringes, and conditions as provided in this Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes and conditions as provided in this Master Agreement. Any such agreement, contract or arrangement presently in existence shall be abrogated upon the execution of this Agreement.

1314. It is further agreed that the Contractor will not devise or put into operation any scheme, whether herein enumerated or not to defeat the terms of this Article of this Master Agreement, nor shall any Owner-Operator's arrangement with a Contractor be terminated for the purpose of depriving any other employee of employment. In the event that the Contractor has available equipment, the Owner-

Operator may be assigned to operate such equipment on the job during the period of the repair of the Owner-Operator's equipment and not to exceed that work shift and so long as no employee is laid off to provide work for such equipment.

1315. Compensation for Use of Owner-Operator's Equipment:

Compensation of compensable time under this Section shall start at the time the Owner-Operator has his equipment in a satisfactory condition and in readiness to perform in response to a definite order and request from the Contractor under the provisions of the Agreement. Time shall cease when the Owner-Operator returns to the point designated by the Contractor minus any time due to delays beyond the control of the Contractor, including but not limited to the breakdown of Owner-Operator's equipment, or equipment available for his use, inclement weather, breakdown or cesation of work on the project affecting the need and/or use of his equipment.

1316. Any insurance coverage on Owner-Operator's equipment desired by the Contractor over and above $100,000/300,000/100,000 shall be at the sole expense of the Contractor.

1317. It is understood by the parties that this Agreement provides for an Employer-Employee relationship between the Contractor or subcontractor and each Owner-Operator of equipment used hereunder.

1318. It is recognized that many Owner-Operators have executed "short-form" agreements with the Teamsters Union which incorporate by reference provisions of this Master Labor Agreement. The provisions of such "short-form" agreement shall be applicable to said Owner-Operators only in their capacity as employers, i.e., when such Owner-Operators are employing one or more employees. When

Owner-Operators are working on a job covered by this Master Labor Agreement their employment shall be covered by the Owner-Operator clause of this Agreement.

1319. If a Contractor through the grievance procedure is found violating any portion of this Article, the Joint Adjustment Board or the Impartial Chairman, as described in Article V, shall require the Contractor to immediately pay compensatory damages for each Owner-Operator with respect to whom the Contractor is in violation in an amount equal to the sum of Health and Welfare and Pension contributions, under the terms of this Agreement, for eight hours for each day or portion thereof the violation occurred, such damages to be made payable to the Construction Teamsters Security Fund by check promptly mailed to the respective Local Union. The Joint Adjustment Board or Impartial Chairman may also grant such further relief as may be deemed appropriate.

1319.1. Notwithstanding any other provision of this Agreement, the sole and exclusive remedy for any violation of this Article XIII shall be sought under the provision of Article IV of this Appendix.

1320. Separability:

If any paragraph of this Article XIII should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any paragraph of this Article XIII should be restrained by such tribunal pending a final determination as to its validity, the remainder of this Agreement or the application of such Article or paragraph to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of, has been restrained, shall not be affected thereby. Should the foregoing eventually arise, the parties agree to negotiate substitute paragraphs or Articles

upon sixty (60) days' written notice by one to the other. In the event the parties fail to reach agreement within sixty (60) days following the beginning of such negotiations, either party shall be free to take whatever economic or legal action it may deem necessary in support of its bargaining position, notwithstanding the no-strike provisions of this Agreement; provided, however, that the party initiating such action shall give to the other party a fifteen (15) day written notice of intention to take such action.

1321. Notwithstanding any other provision of this Agreement, this Article XIII shall be applicable only to Owner-Operators performing (or who, upon their employment, will be performing) work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other construction work.

1321.1 The term 'work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other construction work' as used in the paragraph 1321 shall include all driving to, from and in connection with hauling materials to or from any source or disposal site on the one hand, and a geographical site of construction, on the other hand, in accordance with the following:

1321.1.1 Delivery of materials to or from commercial suppliers or public dumps off the primary location shall always be exempt from the provisions of Article XIII. Any other general exclusions from the construction industry proviso, previously defined by the NLRB or the courts, shall continue to be applicable in interpreting Article XIII.

1321.1.1.1 A public dump is a disposal site available to, and in substantial use by, the public.

1321.1.2 Hauling of materials between a primary location and a secondary location not excluded by paragraph

1321.1.1 above that is located five (5) or less miles by the closest feasible means of access from the nearest boundary of the primary location shall be work to be done at the site, effective August 1, 1977.

1321.1.3 Hauling of material between a primary location and a secondary location located in excess of five (5) miles by the closest feasible means of access from the nearest boundary of the primary location shall not be work to be done at the site, effective August 1, 1977.

1321.2 Effective January 1, 1978, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to six (6). Effective July 1, 1978, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to seven (7). Effective January 1, 1979, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to eight (8). Effective July 1, 1979, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to nine (9). Effective January 1, 1980, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to ten (10).

1321.3 It is understood that the foregoing shall not include travel time to and from the Owner-Operator's home (or parking place other than his home) to the place or source of work.

1321.4 Jobs commenced or bid prior to August 1, 1977 shall be continued under conditions in effect prior to that date, for the duration of the project.

1321.5 It is expressly understood that if a haul is covered by the terms of this Section, all time spent on any public road shall be covered as well as all other time spent in connection with such haul.

1321.6 The Owner-Operator shall become a bonafide employee as defined in paragraphs 1301 and 1302 upon

reporting for work on the first day on that job, such employee status to be effective from the first hour of work performed.

1322. Disagreement over interpretation or application of this Article shall be subject to the Grievance and Arbitration procedure as described in this Appendix.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

JOINT COUNCIL OF TEAMSTERS NO. 42, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Petitioners contend that the National Labor Relations Board erred in concluding (a) that owner-operators of dump trucks who transport materials to and from construction job sites are independent contractors rather than employees, and (b) that their work is not covered by the construction industry proviso to Section 8(e) of the Act, 29 U.S.C. 158(e).

1. The Board concluded that petitioners violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), by "entering into, maintaining, and giving effect to" provisions of its Master Labor Agreement ("MLA") which required that the signatory contractors refrain from doing business with the dump truck owner-operators unless they complied with the terms of the MLA, including its union

membership provisions. In so concluding, the Board found that the owner-operators were independent contractors rather than "employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3), and that the agreement was not privileged by the construction industry proviso to Section 8(e) because the work of transporting materials to and from the work site was not, in the language of the proviso, "done at the site of the construction" (Pet. App. 31-41, 43). The Board issued a cease and desist order, but denied the request of the owner-operators' trade association (a charging party) that the Board require petitioners to make owner-operators whole for losses incurred as a result of the maintenance of the unlawful provisions (Pet. App. 42 n.34).

The court of appeals upheld the Board's finding that petitioners had violated Section 8(e) and enforced its cease and desist order, but remanded to the Board "to fashion a make-whole remedy [for the owner-operators] or to show good cause why a make-whole remedy would not effectuate the purposes of the Act" (Pet. App. 13; footnotes omitted).

2. On July 1, 1982, petitioners filed a petition for a writ of certiorari (No. 82-3) contesting both the Board's unfair labor practice findings and the court of appeals' remand on the question of a make-whole remedy. The Board opposed the certiorari petition insofar as it challenged the finding of an unfair labor practice. 82-3 Br. in Opp. 6-8. As to the issue of the appropriate remedy, however, the Board suggested that the petition be held and disposed of in light of *Shepard* v. *NLRB*, No. 81-1627, in which the Court had granted certiorari to consider the propriety of the Board's denial of a make-whole remedy in essentially identical circumstances. 82-3 Br. in Opp. 8-9.

On January 18, 1983, this Court issued its decision in *Shepard* v. *NLRB*, sustaining the propriety of the Board's denial of a make-whole remedy. On February 22, 1983, the

Court granted the petition for a writ of certiorari in this case, vacated the judgment of the court of appeals, and remanded the case to the court of appeals "for further consideration in light of *Shepard* v. *NLRB*" (Pet. App. 3). On remand, the court of appeals amended its earlier opinion to conform to the holding in *Shepard* requiring deference to the Board's discretion to deny a reimbursement remedy, and it again enforced the Board's order (Pet. App. 1-2).

3. The instant petition for a writ of certiorari simply restates the contentions made in the petition in No. 82-3. It urges this Court to review the Board's determinations, upheld by the court of appeals, that the dump truck owner-operators are independent contractors rather than employees and that the transportation work involved here is not within the scope of the construction industry proviso to Section 8(e). For the reasons stated in our Brief in Opposition in No. 82-3, those issues do not warrant review by this Court.

As explained therein (82-3 Br. in Opp. 6), contrary to petitioners' assertion (Pet. 13-14), there is no conflict between the Ninth and District of Columbia Circuits regarding the status of owner-operators as independent contractors. The D.C. Circuit at one time sustained a decision by the Board that owner-operators are employees, *Joint Council of Teamsters No. 42* v. *NLRB*, 450 F.2d 1322, 1329 (1971). But the Board subsequently changed its view and concluded that owner-operators are independent contractors, and the D.C. Circuit sustained the Board's new position in the *Shepard* case itself. *Building Material & Dump Truck Drivers, Local 36*, 249 N.L.R.B. 386 (1980), enforced, 669 F.2d 759, 764-765 (1981), aff'd *sub nom. Shepard* v. *NLRB*, No. 81-1627 (Jan. 18, 1983). As further explained in response to the prior certiorari petition (82-3 Br. in Opp. 7-8), the courts of appeals have consistently upheld the Board's position that the type of transportation

work involved here is not within the construction industry proviso to Section 8(e), and the legislative history of Section 8(e) supports that position. See H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959). Neither issue, therefore, warrants review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 82-2085

IN THE

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October Term, 1983

JOINT COUNCIL OF TEAMSTERS NO. 42, AND ITS AFFILIATED LOCAL UNIONS, SALES DRIVERS & DAIRY EMPLOYEES, LOCAL 166; GENERAL TRUCK DRIVERS, LOCAL 235; GENERAL TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL 692; CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 186; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 420; GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL 982; TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 898; TEAMSTERS & WAREHOUSEMEN, LOCAL 381, ALL AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA' TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 87, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

(Cover Continued On Inside Front Cover)

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Intervenor,

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC., ENGINEERING CONTRACTORS ASSOCIATION, INC., SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION,

Respondents.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC., ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Intervenors.

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Intervenor.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review the decision of the Ninth Circuit Court of Appeals, affirming the holding of the National Labor Relations Board ("NLRB") that the status of dump truck owner-operators as independent contractors could not be relitigated pursuant to the doctrines of res judicata and collateral estoppel, where such issue had been fully litigated in a prior action involving the identical parties or their privies?

2. Where the NLRB, the Circuit Courts and the legislative history are all in accord with respect to the interpretation and application of the "construction industry proviso" of Section 8(e) of the National Labor Relations Act, as amended, do those circumstances present an important question of federal law which needs to be settled by this Court?

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC., ENGINEERING CONTRACTORS ASSOCIATION, INC., SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION, ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Respondents.

California Dump Truck Owners Association's Response to the Petition For a Writ of Certiorari.

INTRODUCTION

Although it is unnecessary to submit a complete re-statement of this case in this response, clarification of certain aspects of the Statement of the Case presented by the Petitioner may be helpful to the Court.

Essentially, there are four basic interests that are represented by the parties to this proceeding. Petitioner (hereinafter "Unions") obviously presents one view. The Associated General Contractors of California, Inc., The Building Industry Association of California, Inc., The Engineering Contractors Association, Inc. and the

Southern California Contractors Association (hereinafter "Employer Associations") represent another interest. The California Dump Truck Owners Association (hereinafter "CDTOA") is not aligned with either the Unions or the Employer Associations and presents the view of the owner-operators. Finally, the National Labor Relations Board (hereinafter "NLRB"), which is charged with responsibility for administration of the National Labor Relations Act, presents the final perspective.

In summary, as the case history recited in the petition for certiorari suggests, the Unions have been engaged in an effort for over a decade to either represent the dump truck owner-operators in California or alternately, to preclude them from the labor market in which they normally operate. The owner-operators have steadfastly

resisted those attempts. The Employer Associations, for their part, have simply been attempting to adopt whatever position they believe will cause the least interference with or potential disruption of their business operations.

The Unions seek certiorari in this case on the ground that there is an express conflict between the Ninth and District of Columbia Circuits as to whether dump truck owner-operators are employees or independent contractors within the meaning of Section 2(3) of the LMRA. 29 U.S.C. § 152(3). They also assert that the scope of the "construction industry proviso" to Section 8(e) of the LMRA presents an important issue which requires resolution by this Court. 29 U.S.C. § 158(e). It is respectfully submitted that there are no grounds for the petition as to either issue.

ARGUMENT

I. BOTH THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE NINTH CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT CONCUR IN THE NLRB'S DETERMINATION THAT THE OWNER-OPERATORS ARE INDEPENDENT CONTRACTORS WITHIN THE MEANING OF SECTION 2(3) OF THE ACT

The Unions rely upon Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322 (D.C. Cir. 1971), for the proposition that the owner-operators in the instant case have been held to be employees by the District of Columbia Circuit and that therefore, there is a conflict between the District of Columbia Circuit and the Ninth Circuit's more recent determination that the California dump truck owner-operators are independent contractors. Compare Associated General Contractors of Cali-

fornia, Inc. v. N.L.R.B., 564 F.2d 271 (9th Cir. 1977).

In the first instance the record presented to the Ninth Circuit in Associated General Contractors of California, Inc. was not the same record that the D.C. Circuit reviewed in its decision in 1971. Secondly, the D.C. Circuit did not conclude in its decision that the owner-operators were employees. Rather, it simply concluded that, based upon the record before it, it could not displace the NLRB's choice between what appeared to be two fairly conflicting views (employee vs. independent contractor status). Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d at 1329. In short, the D.C. Circuit indicated its belief that it was a close question and that on the record before it, the Court would not substitute its judgment for that of the NLRB. It

should also be noted that there was a vigorous dissent filed in that case by Judge MacKinnon in which he indicated that he believed that on the facts presented the owner-operators were independent contractors. 450 F.2d at 1329-1334.

On a different record, the record generated in Contractor Members of the Associated General Contractors of California, Inc., 201 NLRB 311 (1973), the Ninth Circuit concluded that the NLRB had not chosen between two "fairly conflicting views" as to the dump truck owner-operators' status under the Act. The Ninth Circuit held that the NLRB was wrong in its determination that the owner-operators were employees and instead held that, based upon the record before it, they were independent contractors. Associated General Contractors of California, Inc. v. NLRB, 564 F.2d at 282.

Parenthetically, it is noteworthy that the record from the decertification proceeding in 1973 (Case No. 21-RD-1008) is a part of the record in the instant proceeding. Compare Pet., App. iv at 22, n.5, with Contractor Members of the Associated General Contractors of California, Inc., 201 NLRB 311 (1973).

Thus, there is no conflict between the two Circuit Courts who have addressed the issue as to whether the California dump truck owner-operators are independent contractors. Rather, on two separate records the two separate Circuit Courts of Appeal came to a different result as to the supportability of the Board's underlying determination on those different records.

Moreover, most recently in Building Material and Dump Truck Drivers Teamsters Local Union No. 36 v. NLRB, 669 F.2d 759 (D.C. Cir. 1981), aff'd on

other grounds sub nom. Shepard v. NLRB, ___ U.S. ___, 103 S. Ct. 665, 51 U.S.L.W., 4087 (U.S. January 18, 1983) (No. 81-1627), the D.C. Circuit affirmed the NLRB's determination in a parallel case in San Diego County that the dump truck owner-operators were independent contractors. 669 F.2d at 765. It should be noted that the underlying NLRB decision, sustained by the D.C. Circuit, is based at least in part upon the determination that the California dump truck owner-operators in Associated General Contractors of California, Inc. v. NLRB, 564 F.2d 271 (9th Cir. 1977), were independent contractors and not employees. Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, 249 NLRB 386, 388 (1980). Accordingly, based upon the recent decisions in both the Ninth Circuit and the D.C. Circuit, there is complete accord between them

and with the NLRB that the dump truck owner-operators herein are independent contractors. Hence, there is no conflict between the circuits on this issue.

Finally, it must be noted that the Unions' assertion that it has been somehow denied due process, seems to be based upon an argument that this case presents the first opportunity that the Unions have had to seek resolution of the independent contractor issue. That is incorrect. The Unions were a party in Associated General Contractors of California, Inc. v. NLRB, 564 F.2d 271 (9th Cir. 1977), and to the underlying decertification proceedings. They fully litigated the issue before the NLRB and the Ninth Circuit. Moreover, as a party, the Unions would appear to have had standing to petition for certiorari

in 1977 had they chosen to do so. See 28 U.S.C. § 1254(1).

Finally, the Unions' reliance upon United Insurance Company of America v. NLRB, 272 F.2d 446 (7th Cir. 1959), is misplaced. There, the Seventh Circuit held that a prior NLRB determination of employee status reached in a representation proceeding could not substitute for evidence on such issue in a later unfair labor practice proceeding. Id. at 449. Here, the Unions were not denied the opportunity to submit new evidence. In fact, the Unions stipulated to the facts herein and have agreed that the record in the underlying decertification case "remains unchanged and applicable to the determination of the owner-operators' present employment status." Pet., App. iv at 22, n.5.

In short, there is no appropriate ground for the Union to assert

that this Court should grant certiorari on the issue whether the owner-operators are independent contractors or not. The determinations of the Ninth Circuit and the D.C. Circuit, as well as that of the NLRB, are now consistent and not in conflict. Review of any aspect of the Ninth Circuit's decision on that issue is neither necessary nor appropriate.

II. THE DEFINITION OF THE PHRASE "THE SITE OF THE CONSTRUCTION" AT SECTION 8(e) OF THE ACT IS NOT "UNSETTLED" AND THE CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

In simple terms, the Unions attempt to assert that the interpretation of the so-called construction industry proviso to Section 8(e) of the Act is a matter that this Court needs to "settle." As is ably illustrated by the

citations set forth in the Ninth Circuit's decision, both the NLRB and the Circuit Courts of Appeal are in accord as to the proper interpretation of that proviso, as it applies to this case. Pet., App. iii at 6-7.

The Unions argue that because the owner-operators have historically been covered by successive MLA's the Court should "provide further guidance" because of the alleged congressional intent not to change practices within the construction industry by Section 8(e). The "historical" coverage extended to the owner-operators by successive MLA's to which the Unions refer has always been against the will of the owner-operators and unlawful. This "bootstrap" argument scarcely serves to convert this issue into an important question of federal law that this Court should settle. There is nothing to set-

tle. The Ninth Circuit merely applied the commonly held interpretation of the jobsite proviso to Section 8(e) of the Act.

III. CONCLUSION

For the foregoing reasons, the CDTOA respectfully requests that certiorari be denied.

Respectfully submitted,

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ASSOCIATED INDEPENDENT OWNER-OPERATORS INC.,

Respondent,

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

Should the Unions be permitted to relitigate the issue of the status of owner-operators as employees or independent contractors which issue was decided with finality in 1977?

Does the construction industry proviso to Section 8(e) of the Act shelter secondary boycott agreements that restrict the delivery of materials to and from a construction jobsite?

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No. 82-2085

IN THE

Supreme Court of the United States

October Term, 1982

JOINT COUNCIL OF TEAMSTERS NO. 42 and Its Affiliated Local Unions, *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.; BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC.; ENGINEERING CONTRACTORS ASSOCIATION, INC.; SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION, INC.,

Respondents,

ASSOCIATED INDEPENDENT OWNER-OPERATORS INC.,

Respondent,

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents, Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association, Inc., and Southern California Contractors Association, Inc., pray that the Petition for Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit be denied.

STATEMENT OF CASE.

A. Statement of Facts.

In addition to the facts set forth by Petitioners, the Respondent Employer Associations state the following:

1. The facts relevant to the status of owner-operators are fully set forth in the opinion of the United States Court of Appeals for the Ninth Circuit in the case of *Associated General Contractors of California, Inc. et al. v. N.L.R.B.*, 564 F.2d 271 (1977). This opinion is set forth in Appendix A for the convenience of the Court.

ARGUMENT.

I.

The Unions Are Precluded by Principles of Collateral Estoppel and Res Judicata From Relitigating the Issue of the Status of Owner-Operators as Employers or Independent Contractors.

In 1977, in an unfair labor practice case, litigation involving these very same parties, the United States Court of Appeals for the Ninth Circuit decided the exact issue that Petitioners now ask this Court to decide, namely, that the owner-operators in the present case are independent contractors and not employees within the meaning of Section 2(3) of the Act, 29 U.S.C. §152(3). *Associated General Contractors of California, Inc. et al. v. N.L.R.B.*, 564 F.2d 271 (9th Cir. 1977). At this late date, Petitioners contend that the Ninth Circuit erred in 1977 and seek de novo review here of an issue that has long since been decided. For this proposition, they urge that as "technically prevailing parties" in the previous case they had no opportunity to seek review of the Ninth Circuit's decision (Petitioners' Brief, p. 11). They do not deny that the identical parties and issues were involved in the 1977 case; nor do they dispute that the issue was fully litigated.

Quite simply, Petitioners' contentions are now barred by well settled principles of collateral estoppel and *res judicata*.[1] This becomes evident when the arguments in the

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[1]Under well established precedent, collateral estoppel will be applied when: (1) the issue to be precluded was identical to that involved in the prior action; (2) in the prior action the issue was actually litigated; (3) the same parties or their privies were involved; and (4) the determination of the issue made in the prior action must have been necessary and essential to the resulting judgment. *St. Paul Fire and Marine Ins. Co. v. Weiner*, 606 F.2d 864 (9th Cir. 1970); *International Ass'n of Machinists and Aerospace Workers v. Nix*, 512 F.2d 125 (5th Cir. 1975); *U.S. v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980).

previous suit are examined. The entire thrust and purpose of the previous unfair labor practice case was to obtain indirect court review of the Board's pivotal holding on the employee/independent contractor issue. The Unions and the Employer Associations disagreed on this key issue. The Employer Associations argued that there was no question concerning representation, and hence no unfair labor practice, because the Board had erroneously determined that the owner-operators were employees. The Unions argued that the owner-operators were correctly classified as employees by the Board but there was nonetheless no unfair labor practice. Ultimately the court determined that the owner-operators were indeed independent contractors not employees. In doing so, the Ninth Circuit obviously ruled against Petitioners on this critical issue. Thus, the Unions were "persons aggrieved" within the unique and specific statutory review provisions of the Act. 29 U.S.C. 160(f). Their "technically prevailing" argument rests on the mere assumption that this Court would have denied them standing to petition for review of the Ninth Circuit's 1977 decision. That decision characterized the employee/independent contractor issue as "fundamental".[2] The outcome of this issue most certainly made the Unions losing parties entitled to further review by this Court.

The Board correctly rejected Petitioners' attempt to relitigate the status of the owner-operators by finding the requirements enumerated above to be present here and correctly considered the issue foreclosed, stating:

> "Notwithstanding the foregoing history of litigation, Respondent Unions seek de novo consideration of the dump truck owner-operators' status in the present case

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[2] *Associated General Contractors of California, Inc. v. N.L.R.B.*, 564 F.2d 271, 274 (9th Cir. 1977).

> and urge the Board to find these individuals to be employees. We do not regard such a course of action as appropriate. In the prior representation case and unfair labor practice case litigation, the same parties as are involved herein, or their privies, were present and fully litigated the identical issue of employment status considered herein. Moreover, there has been no significant change in the nature of the owner-operators' work since that litigation terminated. Accordingly, under established principles of res judicata and collateral estoppel, the final and conclusive finding in the prior cases that the dump truck owner-operators are independent contractors is controlling in this proceeding."

Joint Council of Teamsters No. 42, et al., 248 N.L.R.B. 808, 814 (1980).

All of the foregoing, it is submitted, leads to the conclusion that the status of the owner-operators, having once been litigated by these very same parties, cannot now be resurrected by the Unions.

II.

The Construction Industry Proviso to Section 8(e) of the Act Does Not Shelter Secondary Boycott Agreements That Restrict the Delivery of Materials to and From the Construction Jobsite.

This case presents a pedestrian application of the construction industry proviso to Section 8(e) of the Act, 29 U.S.C. §158(e). The Board's opinion, as affirmed by the United States Court of Appeals for the Ninth Circuit, invalidates the collective bargaining agreement only in so far as the agreement purports to reach beyond the site of construction. This case is one of a long series of Board and Court opinions that have confined the application of the construction industry proviso to the construction jobsite itself. *Drivers Local 695 v. N.L.R.B.*, 361 F.2d 547, 552

n.19 (D.C. Cir. 1966).[3]

The Board has never wavered on this issue. The delivery of materials to and from the jobsite has consistently been held to be outside of the protection of the proviso. This is entirely in keeping with the legislative history where Congress indicated that:

> "The [construction industry] proviso does not exempt from Section 8(e) agreements relating to supplies and materials or other products shipped or otherwise transported to, and delivered, on the site of construction."[4]

The rules established in *Connecticut Sand and Stone Corporation*, 138 N.L.R.B. 532 (1962) and *Island Dock Lumber Inc.*, 145 N.L.R.B. 484 (1963) among other cases, established that the criteria for determining jobsite work are the location of the work and the function of the workers. The types of and function of the materials being hauled are of no moment. Obviously, concrete is one of the basic materials required in construction work. The same can be said of the removal of excess dirt, the importation of fill dirt or the importation of gravel and the like. The Board in its opinion below correctly recognized that its long established rules have nothing whatever to do with the type of material hauled.

The plain meaning of "at the site" is: within the boundaries of a geographical location where construction of an improvement is in progress. Congress, the Board and the Courts have clearly distinguished transportation services to that geographic location from the construction work which occurs there. There is no logical or lawful basis for distin-

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[3]See also cases cited by the Board in its opinion below at footnotes 24 through 27 reproduced as Appendix ii, page 34 to the within Petition.

[4]House Conference Report No. 1147, 86th Congress, 1st Sess., p. 39; I Legislative History of the LMRDA, p. 943.

guishing the transportation *to* the jobsite and transportation *from* the jobsite and the Board and court below correctly so held. Surely, the truck driver, who goes to the jobsite to remove unused steel or other materials for return to the supplier, would not be engaged "at the site." With equal certainty, the hauling of any other waste materials from the construction jobsite is indistinguishable (in terms of function and location of the truck driver) from the transportation of supplies and materials to the jobsite.

A jobsite, as envisioned by Congress, is a location undergoing construction, alteration or repair. A public highway is always an open, clear thoroughfare for the passage of citizens and commerce. No construction worker may claim a completed public highway or road as his worksite. Both Houses of Congress were adamant in their efforts to ban the "hot cargo" agreements in the transportation industry. The report to the Senate, stated:

> "The Landrum-Griffin Bill extended the 'hot cargo' provisions of the Senate Bill, *which we applied only to Teamsters,* to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project." (*II Leg. Hist. of the Landrum-Griffin Act*, p. 1432.) (Emphasis added.)

It is clear from the foregoing that Congress did not intend, in granting the construction exemption, to allow the Teamster unions a loophole for again applying "hot cargo" agreements to transportation services along the public highway.

The Board and the Ninth Circuit correctly determined that this is just another in a long series of cases preventing the Teamsters from bringing within their net, persons not engaged at the site of construction.

CONCLUSION.

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Judgment.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., Building Industry Association of California, Inc., and Engineering and Grading Contractors Association, Inc., Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent and Joint Council of Teamsters No. 42, General Teamsters and Food Processing Union, Local No. 87, Sales Drivers & Dairy Employees Union, Local No. 166, Chauffeurs, Teamsters & Helpers Union, Local No. 186, General Truck Drivers Union, Local No. 235, Teamsters & Warehousemen Union, Local No. 381, Building Material & Dump Truck Drivers Union, Local No. 420, General Truck Drivers, Chauffeurs & Helpers Union, Local No. 898, and General Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 982, all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Associated Independent Owner-Operators, Inc., and California Dump Truck Owners Association, Intervenors.

TEAMSTERS LOCAL UNION NOS. 137, 150, 216, 287, 291, 386, 431, 439, 490, 315, 624, 684, 890, 912 and 980, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and Heavy, Highway, Building and Construction Teamsters Committee of Northern California, Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent. Nos. 75-3157, 75-3370 and 75-3580.

United States Court of Appeals, Ninth Circuit.

Oct. 11, 1977. Rehearing and Rehearing En Banc Denied Dec. 30, 1977.

Petition for Review and Cross-Application for Enforcement of a Decision of the National Labor Relations Board.

Before BARNES and SNEED, Circuit Judges, and WONG,* District Judge.

SNEED, Circuit Judge:

Associated General Contractors of California, Inc. (AGC), Building Industry Association of California, Inc. (BIA), and Engineering and Grading Contractors Association, Inc. (EGCA) (jointly referred to as "Employers"), Teamsters Local Union No. 137, et al. (Northern California Unions), and the Associated Independent Owner-Operators, Inc. (AIOO), petition this court under section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f) (Act) to review a decision and order of the National Labor Relations Board (Board). The Joint Council of Teamsters No. 42, et al., (Southern California Unions) and the California Dump Truck Owners Association (CDTOA) have intervened, and the Board has filed a cross-application for enforcement. In the decision and order, the Board found that the Employers had engaged in unfair labor practices, within the meaning of sections 8(a)(1) and (2) of the Act 29 U.S.C. §§ 158(a)(1) and (2)[1] by entering into, maintaining and enforcing con-

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*Honorable Dick Yin Wong, United States District Judge for the District of Hawaii, sitting by designation.

[1]Sections 8(a)(1) and (2) provide that

(a) It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section 157 of this title;

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

tracts with the Unions at a time when a real question concerning the representation of the employees existed. It is reported at 220 N.L.R.B. 93.

I. *Facts.*

The AGC, BIA and EGCA are voluntary associations of employers engaged in the building and construction industry. They represent their employer-members in negotiating and administering collective bargaining agreements; all three represent employers in their negotiations with the Southern California Unions and the AGC and EGCA represent employers in negotiations with the Northern California Unions.

The Employers use dump trucks and other vehicles in the course of their construction businesses. These vehicles are operated either by driver-employees, who are employed in the traditional sense and who are represented by the Union,[2] or owner-operators, who are represented by the AIOO and the CDTOA. The fundamental issue around which this litigation swirls is whether these owner-operators should be classified as self-employed independent contractors or employees of the Employers.[3]

Prior to 1971, the Master Labor Agreement (MLA) negotiated by the Employers and the Unions did not cover owner-operators. In 1970, the Unions obtained a modification of the MLA, which was executed in January, 1971, that would subject the owner-operators to Union control by

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[2]The status of these driver-employees is not at issue, nor is their representation by the Unions questioned.

[3]Neither the parties nor this litigation is a newcomer to this Court. The AIOO previously challenged in district court the Board's finding with respect to the employment status of the owner-operators and attempted to have the election enjoined. The district court dismissed the case for lack of jurisdiction and we affirmed. *Bays v. Miller*, 524 F.2d 631 (9th Cir. 1975).

expanding the coverage of the MLA to include owner-operators as employees. This modification prompted three owner-operators to file decertification petitions with the Board on February 26, 1971, seeking elections in their respective bargaining units and decertification of the incumbent Unions as sole bargaining representatives of construction industry employees.

The Board held hearings on these decertification petitions in which the parties presented conflicting contentions as to the status of the owner-operators. On January 17, 1973, the Board rendered its decision in which it held that the owner-operators were "employees" within the meaning of the Act, that they were entitled to participate in an election, and that a question concerning the representation of the employees existed. 201 N.L.R.B. 311. The Board also remanded the cases to the Regional Director to determine the scope of the bargaining units and the eligibility of the employees. After hearings on these issues, on March 5, 1974 the Board issued a Supplemental Decision and Direction of Election, which held, *inter alia* that owner-operators were properly included with driver-employees in the same bargaining unit and which directed elections by mail in the separate Northern and Southern California units. 209 N.L.R.B. Nos. 61, 62.

In July 1974, in the midst of election proceedings in the northern and southern regions, the Employers entered into new collective bargaining agreements, which covered the owner-operators, with the Unions. Almost immediately therefter, the owner-operator associations, the AIOO and the CDTOA, filed unfair labor practice charges against the Employers. The Board suspended further processing of the

elections pending the determination of the unfair labor practice charges[4]

The Board consolidated these charges and held hearings in January, 1975. In September, 1975 the Board rendered the decision now on appeal, finding violations of sections 8(a)(1) and (2) and ordering, *inter alia*, the Employers to cease and desist from further bargaining with the Unions and from enforcing the 1974 contract until the Unions provided their majority representation status in a Board conducted election.

II. *The Contentions.*

The parties bring several issues to this court for review. The first, not surprisingly, deals with the problem of whether the owner-operators are independent contractors or employees. This issue, however, divides itself into two parts; first, whether this court may even reach the issue at this stage and second, whether the Board properly classified the owner-operators as employees. The Employers and the owner-operators here join forces and contend that this court may consider the issue in its review of the unfair labor practice charge and that this court should reverse the Board's finding as to the status of the owner-operators. Inasmuch as this finding underlies the unfair labor practice charge, the Employers and owner-operators seek a remand of the unfair labor charge to the Board. On the other hand, the Board and the Unions insist that this court may not reach the issue because the finding was made in the course of a

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[4]In the southern region, the Board had prepared eligibility lists and had mailed the ballots to the eligible voters. In the northern region, eligibility lists were being prepared. Upon the filing of the unfair labor practice charges, the Board impounded all the votes it had received and discontinued any further proceedings in the elections.

representation investigation under section 9(c), 29 U.S.C. § 159(c).

The second issue presented by the parties is whether, assuming the owner-operators were properly classified as employees, the evidence was sufficient to support the Board's finding that a real question existed concerning the representation of the majority of the employees. On this issue, the owner-operators align themselves with the Board in support of the Board's finding, whereas the Employers and the Unions stand shoulder to shoulder and argue that the evidence did not support such a finding.

The AIOO also complains of the Board's remedy for the unfair labor practice. It argues that its members are entitled to recover certain losses incurred as a result of the Employers' entering into collective bargaining agreements with the Unions. In addition, it contends that the Board should not have permitted the Employers to continue to recognize the Unions as representatives of the employees.

For the reasons hereafter stated, we hold that appellate review of the issue of the employment status of the owner-operators is proper under the circumstances of this case and we conclude that under the facts before us, the owner-operators appropriately should be classified as independent contractors, not employees. This holding makes it unnecessary to reach the remaining issues. We deny enforcement of the Board's order and remand the cases to the Board for further consideration of the unfair labor practice charges in the light of this opinion.

III. *Availability of Appellate Review.*

The parties focus their respective arguments as to whether this court may review the Board's finding with respect to the employment status of the owner-operators on the proper

interpretation of section 9(d) of the Act, 29 U.S.C. § 159(d), which provides:

> (d) Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The Board contends that this section permits review of rulings made by the Board in representation proceedings only after the Board has (1) held an election, (2) certified the results and (3) ordered the employer to do something based on these election results. It relies heavily on the Supreme Court's decision in *Boire v. Greyhound Corp.*, 376 U.S. 473, 484 S.Ct. 894, 11 L.Ed.2d 849 (1964), where the Court observed "the purpose of § 9(d) was to provide 'for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election.' " *Id.* at 478-79, 84 S.Ct. at 897-98. Inasmuch as the three prerequisites to appeal have not been satisfied, the Board argues, this court may not review the Board's finding. The owner-operators, however, insist on what they consider to be a more practical application of section 9(d). They contend that because the record of the representation case is included

in the record of this unfair labor practice case[5] and was the basis for the finding that an unfair labor practice had been committed, section (d) is satisfied and this court may consider the matter. While conceding that findings in representation proceedings generally are reviewable in the context of a review of an unfair labor charge based on a refusal to bargain with a certified bargaining representation under section 8(a)(5), 29 U.S.C. § 158(a)(5), the owner-operators argue that such findings are also reviewable in the course of a review of other unfair labor practice charges, such as the sections 8(a)(1) and (2) charges in these cases.

We agree with the Board in that section 9(d) in itself does not allow us to review this ruling of the Board. Nonetheless, we conclude that we may review the Board's finding, under section 10(f), 29 U.S.C. § 160(f), in conjunction with our review of the unfair labor practice charges now before us, and that this review is not precluded by section 9(d).

The legislative history of section 9(d) supports our reasoning. Prior to the enactment of section 9(d) in 1935, direct review of election orders prior to the election was permitted. This allowed employers to engage in dilatory tactics aimed at weakening the position of the unions, whose influence tended to wane as the election was postponed pending court review. *See* 79 Cong. Rec. 7569 (1935) (remarks of Sen. Wagner). To remedy this defect, Congress passed section 9(d). By its enactment, Congress intended to abolish direct review of the representation findings, replacing it with a method of indirect review whereby an employer faced with a Board order relating to an unfair labor practice based on the results of an election could obtain review of the underlying representation proceeding indirectly through the re-

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[5]The parties introduced the record of the representation case into evidence at the hearing below, and it is a part of the record before us.

view of the unfair labor practice decision. It is clear that Congress did not contemplate direct review of representation proceedings prior to an election. S.Rep. No. 573-74, 74th Cong., 1st Sess., 14 (1935). See *Boire v. Greyhound Corp., supra; A. F. of L. v. N.L.R.B.*, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347 (1940). Instead, Congress struck a balance which would prevent undue interference with the election process with its attendant detrimental effect on labor relations but which also would provide for eventual review of the representation proceedings. *See* H.R.Rep. No. 969, 74th Cong., 1st Sess., 5, 20-21 (1935); H.R.Rep. No. 972, 74th Cong., 1st Sess., 5-6, 20-21 (1935).

Congress reaffirmed its belief in this balance during the passage of the Labor Management Relations Act of 1947. The House proposed an amendment to section 10(f) which would allow "any person aggrieved by a final order of the Board [including an order of certification under section 9]" to appeal. This amendment sought to cure the unfairness of the present system, in which many of the parties are without an effective avenue of appeal, by giving any aggrieved person the right to a direct appeal from the election order.[6] The amendment was rejected because it would permit the same dilatory tactics used prior to 1935. 93 Cong.Rec. 644 (1947) (remarks of Sen. Taft).

In sum, the intended thrust of section 9(d) was aimed at the prohibition of *direct* review of certification orders; *indirect* review at some point was clearly envisioned. Taken in this context, comments such as "Section 9(d) makes it

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[6]This [the current] procedure is unfair to everyone; the Union that wins, which frequently must wait for months to exercise its rights; the union that loses, which has no appeal at all no matter how wrong the certification may be; the employees, who have no appeal; and the employer, for whom an appeal involves great risks.
H.R. No. 245, 80th Cong., 1st Sess., 43 (1947).

absolutely clear that there shall be no right to court review anterior to the holding of an election." S.Rep. No. 573, 74th Cong., 1st Sess., 14 (1935) must be viewed as merely restating the intention of Congress to deny *direct* review of certification orders. It does not follow that indirect review of representation proceedings prior to an election is prohibited.

N.L.R.B. v. Falk Corp., 308 U.S. 453, 69 S.Ct. 307, 84 L.Ed.2d 396 (1940), is not to the contrary. In that case, the Board, in a consolidated proceeding, (1) had found that the employer had committed an unfair labor practice by fostering and dominating a company union and (2) had directed an election to be held without the participation of the company union. The court of appeals granted enforcement of the Board's order to cease dominating and to disestablish the company union. However, on its own volition, it ordered that the employees in a future election should be free to choose the company union. The Supreme Court primarily was concerned with only the latter holding.

The Court held that section 9(d) did not authorize "such anticipatory judicial control of election methods." Inasmuch as none of the Board's orders was " 'based in whole or in part upon facts certified' as the result of an election," *N.L.R.B. v. Falk Corp.*, 308 U.S. at 459, 60 S.Ct. at 311, the court of appeals was powerless to modify the election proceeding. The Court limited the power of the court of appeals under section 9(d) to review of Board orders based on an actual certification of a bargaining representative.

> The proposed election here has not even been held and consequently no certification of a proper bargaining agent has been made by the Board. Until that election is held, there can be no certification of a bargaining representative and no Board order—based on a certi-

> fication, has been or can be made, so as to invoke the court's powers under 9(d).

N.L.R.B. v. Falk Corp., 308 U.S., at 459, 60 S.Ct. at 311.

Under the Court's reasoning (contrary to the owner-operators contention at oral argument) "facts certified" are limited to those actually certified after an election, *viz.*, the certification of the bargaining unit, bargaining representative, etc., and do not include any facts which the Board may "certify" as part of the record. The Court spoke unequivocally when it said:

> There can be no court review under 9(d) until the Board issues an order and requires the employer to do something predicated upon the result of an election.
>
> Since the employer has not been ordered by the Board to do anything predicated upon the results of an election the court had no authority to act under 9(d).

Id.

Although section 9(d) provides no authority to consider the owner-operator issue, it also does not preclude reaching the issue in the context of the independent unfair labor practice under section 10(f). The basis for this conclusion resides in *Falk*. The pivotal finding there was that the employer fostered and dominated the company union. This finding provided the basis for the Board's unfair labor practice holding, which holding was reviewed by the court of appeals in the course of deciding that the Board's order to cease dominating and to disestablish the company union should be enforced. The Supreme Court recognized that the court of appeals had jurisdiction to review the Board's unfair labor practice holding and in the course of that review, to determine whether the Board had correctly found that the employer fostered and dominated the company union. Had it not so recognized jurisdiction it would have pointed out that the circuit court's enforcement of the unfair labor practice order was a *brutum fulmen*. No such indication was given. Moreover, nothing in *Falk* indicates that the circuit court's power was limited to enforcement only.

Here, the pivotal finding by the Board was that owner-operators are employees. This finding was the basis for conducting an election in which the bargaining unit included owner-operators. It also was the basis for the unfair labor practice of bargaining with a union when a question concerning representation exists. In reviewing the Board's unfair labor practice holding under the authority of section 10(f) we must determine whether the Board correctly held the owner-operators to be employees. In doing so we are merely doing what the court of appeals in *Falk* did when it reviewed the facts and enforced the Board's order to cease dominating and to disestablish the company union.[7] Our jurisdiction, however, is limited to the unfair labor practice proceedings. Under *Falk*, we have no juisdiction to review any order in connection with the representation proceedings.[8]

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[7]The case before us admittedly is distinguishable from *Falk* in terms of the chronology of events. In *Falk*, the two proceedings were held simultaneously, whereas in our case the representation case preceded the unfair labor case. This is a distinction without a difference. To illustrate, assume that in *Falk*, the representation case was heard first, and the Board found that the employer had fostered and dominated the company union and therefore the Board would not place the company union's name on the ballot. Then, because of this finding, an unfair labor practice charge was heard, relying mainly on the earlier finding in the representation proceeding. To allow this procedural difference to deprive this court of the power to reach the controlling issue in this case places form over substance.

[8]To illustrate further, we turn to the Fourth Circuit decision in *E. I. Dupont De Nemours & Co. v. N.L.R.B.*, 116 F.2d 388 (4th Cir. 1940), cert. den. 313 U.S. 571, 61 S.Ct. 959, 85 L.Ed. 1529 (1941), which relies heavily on *Falk*. As in *Falk*, the Board, in consolidated unfair labor practice and representation proceedings, had found that the employer had committed an unfair labor practice by dominating a company union and therefore the Board excluded the company union from the ballot. The court of appeals reversed the Board on the unfair labor practice issue, finding that the employer had not interfered with the formation or operation of the company union. Under *Falk*, however, it held that it could not review the finding as it related to the representation proceeding and consequently could not reverse the Board decision to exclude the company union from the ballot. Similarly, we may not reverse the Board decision in the representation proceeding with respect to the inclusion of the owner-operators in the bargaining unit on the basis of our decision herein. Nevertheless, we may reverse the Board with respect to the owner-operator question as it relates to the unfair labor practice charges now before us.

We do note one other difference. In the instant case, it was the employers' action taken after the Board's finding that precipitated the unfair labor practice charge. In *Falk*, the employer's actions preceded both the representation proceeding and the unfair labor practice proceeding. This difference should not change the result because it is not relevant to the issue before us, to wit, whether this court may consider a finding made in a representation proceeding in the course of its review of an unfair labor practice charge when the representation proceeding is incorporated into the unfair labor practice proceeding.

Holding as we have that in the context of the unfair labor practice charge we may consider the issue of whether the owner-operators are properly considered employees or independent contractors, we now turn to the merits of this problem.

IV. *Reversal of the Board's Finding.*

The facts relating to the independent contractor-employee controversy are not in question. We need only determine (1) whether the Board employed the correct legal standard in deciding this question and (2) if so, was this legal standard properly applied.

For the purpose of section 2(3) of the Act, 29 U.S.C. § 152(3), the term "employee" does not include "any individual having the status of an independent contractor." In distinguishing between the two, both the Board and the courts must apply general agency principles, *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 256, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968), such as those found in the *Restatement (Second) of Agency* § 220(2) (1957). *Associated Independent Owner-Operators, Inc. v. N.L.R.B.*, 407 F.2d 1383 (9 Cir. 1969). Of the considerations employed in reaching a decision under general agency law, the deter-

mination of who has the right to control and direct the work is foremost. *SIDA of Hawaii, Inc. v. N.L.R.B.*, 512 F.2d 354 (9th Cir. 1975); *Associated Independent Owner-Operators, Inc. v. N.L.R.B., supra*. It must be tempered, however, by other considerations relevant to the relationship in its entirety. *N.L.R.B. v. United Insurance Co., supra*. Although the Board applied this "right-of-control" test, we disagree with its application of the test and its apparent failure to give sufficient weight to other indicia of independent contractor status.

Yet simple disagreement with the Board does not mandate reversal. We may not reverse the Board simply because we might have decided the case differently were it tried before us *de novo, N.L.R.B. v. United Insurance Co., supra*, nor may we reverse if the board has chosen between two fairly conflicting views of the issue. *N.L.R.B. v. United Insurance Co., supra; SIDA of Hawaii, Inc. v. N.L.R.B., supra; Associated Independent Owner-Operators, Inc. v. N.L.R.B., supra*. On the other hand, if the Board decision that the owner-operators are employees lacks substantial support in the record considered as a whole, we must reverse. Inasmuch as the determination of this issue will depend on the particular facts of the case, we shall first describe the factual setting before us.[9]

The owner-operators own and operate dump trucks and perform hauling services for contractors. They deal either directly with the contractor or through an overlying carrier, who contracts with the contractor to provide hauling services and in turn subcontracts this work to the owner-operators for a fee of 5% of the minimum tariff for the work. An owner-operator generally will have such subcontractual, or

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[9]These facts are derived from the Board's decision in the underlying representation case, reported at 201 NLRB 311.

subhaul, agreements with various overlying carriers; conversely, an overlying carrier will have subhaul agreements with various owner-operators. The overlying carriers do not supervise in any significant fashion the work of the owner-operators. Rejection of referrals from overlying carriers is common; an owner-operator often will turn down work he believes is too dangerous, unprofitable or that simply does not fit into his schedule.

The relationship between an owner-operator and a contractor generally is short-lived. An owner-operator may work for as many as 100 contractors in any given year, and sometimes will work for two different contractors during the course of one work day.

The California Public Utilities Commission (PUC) establishes the minimum tariff, which includes compensation for both labor and equipment. Owner-operators are free to negotiate for higher rates; the minimum tariff operates as a floor below which the rates may not fall. Owner-operators are usually paid by the hour, although sometimes their pay is based on mileage and tonnage rates. Unlike employee-drivers, who are paid on an hourly basis from the time they are told to report to work until the work day is finished, regardless of whether the equipment is in operation throughout that period, owner-operators are not paid for the time their equipment is inactive. Moreover, the contractors do not deduct state and federal income tax, social security, or disability insurance from the owner-operators' wages. The owner-operator keeps track of his own time and presents a bill for his services to the contractor or overlying carrier. This is then compared against the records kept by the contractor or overlying carrier to prevent padding of the bill.

Under the regulations of the PUC, the owner-operators must obtain a permit issued by the PUC, be bonded, and carry sufficient liability insurance. In addition, owner-

operators are responsible for any traffic citations for overloading and spillage.

An owner-operator bears the entire cost of his enterprise. This usually includes his trucking equipment ($15,000 to $20,000), a service pick-up ($1,000 to $4,000), tools ($500 to $1,500), insurance premiums ($500 to $3,500), and office supplies, including for example, stationery, invoices, a typewriter and a calculating machine. In addition, he must pay all maintenance and operational expenses.

An owner-operator may hire a driver to operate his equipment, in which case he pays the driver an hourly wage and makes the standard deductions from the driver's pay. He may also subcontract the work to another owner-operator. In either case, he need not first receive permission for such substitution from, nor even report the substitution to, the contractor. If he hires a driver, this driver is under the exclusive control of the owner-operator.

At the jobsite, the owner-operators observe the same starting time, quitting time and lunch break as do employee-drivers. In most cases, the contractors direct the owner-operators where to load and to dump the materials and designate the routes to be taken. Contractors may have personnel, known as "load checkers," who oversee the performance of the owner-operators. Contractors also often have "spotters" who tell the owner-operators where to dump the material. On occasion, contractors take disciplinary actions in the form of reprimands or docking pay for an owner-operator's poor performance.

In determining that the owner-operators are employees, the Board seized on several facts relating to the owner-operators' performance of their work at the jobsite and concluded that these facts indicated that the contractors had the right to control the manner and means by which the desired

result was accomplished and that the relationship between the parties was therefore that of employer-employee. In so concluding, the Board, although recognizing the distinction between the right to control the manner and means and the right to control only the result, failed to draw this distinction properly. Moreover, the factors relied upon by the Board are not persuasive evidence of an employer-employee relationship.

The contractors' control of the loading and dumping sites and instructions to the owner-operators as to where to pick up and dump this material demonstrates the contractor's right to control the result of the work, not the manner or means of doing the work. Such instructions have little to do with the actual operation of the equipment, *viz.* the manner in which material is loaded, unloaded, and transported. See *Associated Industrial Owner-Operators, Inc. v. N.L.R.B.*, *supra*. Nor does designation of the routes to be taken necessarily indicate that the contractors controlled the manner and means of accomplishing the desired result. Inasmuch as the owner-operators are paid by either the hour or by the mile, it certainly is in the contractors' best interest not to permit owner-operators to take circuitous routes to and from the jobsite. Control of this facet of the business merely prevents padding of the ultimate cost. In the same vein, neither the presence of load checkers, who make certain that the dump trucks do not take side trips, nor spotters, who direct the owner-operators where to dump the material, deprives the owner-operators of their independent status. The existence of the load checkers is simply a by-product of the method of payment. The spotters perform a function which involves primarily the final result of the owner-operator's services.

The Board also pointed to the fact that contractors reprimand owner-operators for "standing around and talking,

for dumping at a site not designated by the contractor, and for taking excessively long lunch breaks" as an indication for the contractors' control. Clearly the designation of a dumping site is a part of the desired result, which is within the sphere of the contractors' control is a contractor-independent contractor relationship. *Associated Independent Owner-Operators v. N.L.R.B., supra.* As for reprimands for loafing and taking excessively long lunch breaks, these are to be expected from a contractor who wishes to complete a job on time. Such reprimands are not examples or interference with the manner and means by which an owner-operator loads his truck, transports material to a dump site, and unloads his truck.

Finally, the Board notes that the owner-operators are required to observe the same starting and quitting times and lunch breaks as the rest of the employees. Again, this is a necessary requirement by virtue of the need for cooperation among the various workmen at a construction site. Loaders load the dump trucks; the owner-operators must coordinate their work with these loaders. Such coordination would be more difficult if varying lunch hours were observed. We accorded the insignificant factor of prescribed working hours little weight in *Associated Independent Owner-Operators v. N.L.R.B., supra,* and do so again here.

Looking at the relationship in its entirety, it becomes even clearer that the owner-operators are independent contractors. Each operates an independent business of his own, see *Restatement, supra,* § 220(2)(b), in which the contractors exercise no control. See *Joint Council of Teamsters No. 42 v. N.L.R.B.*, 146 U.S.App.D.C. 275, 282, 450 F.2d 1322, 1329 (1971) (MacKinnon, J., dissenting). Each is a skilled operator. *Associated Independent Owner-Operators v. N.L.R.B., supra; Restatement, supra,* § 220(2)(d). Being entrepreneurs, each must invest substantial sums in equip-

ment and bear the risk of any loss attributed to his operation. See *SIDA of Hawaii, Inc. v. N.L.R.B., supra; Brown v. N.L.R.B.*, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008, 93 S.Ct. 441, 34 L.Ed.2d 301 (1972). It is the owner-operator's responsibility to meet the regulations of the PUC so that he may operate legally. The success of an owner-operator depends upon his own skill and business acumen, and does not depend on that of any operator. He may work as little as he wants or as much as he can, and for as many different contractors as will hire him. It is unlikely that he will work for any single contractor for an extended length of time. See *Restatement, supra* § 220(2)(f). He does not have a continuing relationship with a contractor in the same sense that an employee has a continuing relationship with an employer. His relationship is ongoing only in that he may do some more work for the contractor some time in the future. In short, owner-operators run businesses completely independent of the contractors, and in the main are not subject to their control. The contractors' only real concern is in the accomplishment of the job for which the owner-operators are hired, to wit, the loading, hauling and dumping of material. Any supervisory activity of the contractors is limited to that which is necessary to accomplish this goal. See *Joint Council of Teamsters No. 42 v. N.L.R.B., supra* (MacKinnon, J., dissenting).

There are other indicia of the independent contractor status of the owner-operators. Although paid on an hourly basis, which is usually an indication of employee status, *Restatement, supra*, § 220(2)(g), the hourly rate reflects amounts attributed to the use of the equipment as well as to the value of the labor. Thus, owner-operators are not paid for the time they are on the jobsite when their equipment is idle. Moreover, the contractors do not make any of the normal deductions from the pay of the owner-operators,

contrary to the practice commonly employed with respect to true employees. Also contrary to the practice used in dealing with employees, each owner-operator is free to reach his own bargain with each contractor as to the amount he is to be paid, limited only by the minimum tariff set by the PUC. We note that all of these considerations were present in *Associated Independent Owner-Operators v. N.L.R.B., supra,* where we reversed a Board decision finding owner-operators of graders employees.

In addition, owner-operators may hire substitute drivers or subcontract the work to another owner-operator without prior permission, or any notification to, the contractor. This is clearly inconsistent with a finding that a personal employer-employee relationship exists. It is further evidence that the owner-operator's truck is his exclusive domain, and that its operation is beyond the authority of the contractor.[10]

In determining whether the owner-operators are employees or independent contractors, the "total factual context" and "all the incidents of the relationship must be assessed and weighed with no one factor being decisive." *N.L.R.B. v. United Insurance Co.*, 390 U.S. at 258, 88 S.Ct. at 991. This the Board failed to do. Instead, it gave inordinate weight to isolated examples of contractor control at the jobsite, control which in the main involved only the result sought to be accomplished.[11] Given the exigencies of a con-

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[10]We also note that contractors do not give owner-operators any instructions on how to operate the dump trucks, nor do they require that the trucks be of a certain type or be maintained in any certain fashion.

[11]We disagree with the majority in *Joint Council of Teamsters No. 42 v. NLRB*, 146 U.S.App.D.C. 275, 450 F.2d 1322 (1971), which held that the owner-operators of dump trucks were employees. That court found that the contractors did exercise sufficient control of the details of the work to outweigh other indicia of independent contractor status. However, we are of the opinion that the D.C. Circuit erred in two respects. First, it failed to consider the relationship as a whole, and second as was the Board in the case before us, it was blinded by presence of the contractors' right to control details of work which were necessary only to insure a smooth running construction job and the accomplishment of the desired result.

struction site, the contractor's reasonable instructions as to trivial matters, such as the timing of the lunch hour, cannot transform what by every other indicia is a contractor-independent contractor relationship into an employer-employee relationship. Looking to the "total factual context" of the relationship which the owner-operators and contractors maintain, we hold that the Board erred in concluding that the owner-operators of dump trucks are employees. This holding does not depart from the spirit of our earlier holding in *Associated Independent Owner-Operators, Inc. v. N.L.R.B., supra.*

We deny enforcement of the Board's decision and order of September. 1975 and remand this case to the Board for further proceedings consistent with this opinion.